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**U.S. Supreme Court Update**

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## U.S. SUPREME COURT UPDATE

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### **Court Grants Application for Stay in Idaho State Tax Ballot Measure Initiative and One New SALT Petition Filed**

\*32 On July 30, 2020, in [Little v. Reclaim Idaho, \(Docket No. 20A18\)](#), the Court granted the State of Idaho's application to stay the preliminary injunction orders of the U.S. District Court for the District of Idaho, that gave Reclaim Idaho, a political action committee, additional time to collect ballot signatures for its tax initiative through an online system. Chief Justice John Roberts was joined by Justices Samuel Alito, Neil Gorsuch and Brett Kavanaugh in granting the stay, and Justice Sonia Sotomayor was joined by Justice Ruth Bader Ginsburg dissenting from the grant of stay. (The merits of the case will be heard by the U.S. Court of Appeals for the Ninth Circuit, on August 13, 2020.)

On July 10, 2020, the Court received a new petition for writ of certiorari involving state sovereign immunity, comity and the availability of declaratory or injunctive relief in a company's home state when another state seeks to impose its taxing jurisdiction. Specifically, in [Great Lakes Minerals, LLC v. Ohio, et. al.](#) (Docket No. 20-24) ruling below at [597 S.W.3d 169 \(Ky. 2019\)](#), the Court has been asked to review the Kentucky Supreme Court's denial of Great Lakes Minerals, LLC's ('Great Lakes') request for declaratory judgement that it was not subject to Ohio's Commercial Activity Tax, request for monetary relief pursuant to [42 U.S.C.A. § 1983](#) for the forced collection of taxes not owed in violation of the Ohio and the U.S. Constitutions, and request under Kentucky's rules of civil procedure for a determination that it would be inequitable to require Great Lakes to defend an action in a foreign state.

We continue to track [Rogers County Bd. of Tax Roll Corrections v. Video Gaming Technologies Inc.](#) (Docket 19-1298), petition for cert. filed May 14, 2020, and the issuance of the Special Master's Reports in the MoneyGram cases: [Delaware v. Pennsylvania](#), 22O145 and [Arkansas et al. v. Delaware](#), 22O146. These cases involve a dispute between Delaware and several other states concerning which states have priority rights to claim abandoned, uncashed MoneyGram 'official checks.'

### **Idaho Victorious in Blocking Lower Court's Injunction**

\*\*2 Plaintiff, Reclaim Idaho, a political action committee sought to place a citizen initiative (Invest in Idaho, which would raise certain state taxes to fund education) on the Idaho November 2020 general election ballot. Reclaim Idaho had to collect a certain number of signatures to qualify the ballot initiative. However, the circumstances caused by the COVID-19 pandemic prevented it from collecting signatures.

Still seeking to qualify for the 2020 general election ballot, Reclaim Idaho brought a lawsuit and asked the U.S. District Court for the District of Idaho for specific relief, including in part, the issuance of a ‘preliminary injunction extending the deadline to submit petition signatures... and to permit the electronic circulation of the initiative and to the State to accept electronic signatures.’

The U.S. District Court for the District of Idaho found that Plaintiff ‘established it is likely to succeed on the merits, it will suffer irreparable harm in the absence of preliminary relief, the balance of the equities tips in its favor, and an injunction is in the interests of the public.’ Having so found, the District Court ordered Idaho either to certify the initiative for inclusion on the ballot without the requisite number of signatures, or to allow Reclaim Idaho additional time to gather digital signatures through an online process of solicitation and submission. As explained by the Court, ‘[w]hen the State chose neither option, the District Court authorized the sponsor to join with a third-party vendor [DocuSign] to develop and implement a new online system over the course of nine days.’ After the Ninth Circuit denied Idaho’s request for a stay pending an appeal, Idaho presented its emergency application for stay to Justice Elena Kagan to stay the orders of the District Court.

### **Standard to stay preliminary injunction orders.**

To obtain a stay from a preliminary injunction, the Court states that, ‘the State must show (1) a ‘reasonable probability’ that this Court will grant certiorari, (2) a ‘fair prospect’ that the Court will reverse the judgment below, and (3) a ‘likelihood that irreparable harm will result from the denial of a stay.’” *Citing Hollingsworth v. Perry*, 558 U.S. 183, 190, 130 S. Ct. 705, 175 L.Ed.2d 657 (2010) (per curiam). In the concurrence view, ‘the State has satisfied each requirement for a stay.’

Chief Justice Roberts quickly disposed of the first requirement, asserting that \*33 ‘the Court is reasonably likely to grant certiorari to resolve the split presented by this case on an important issue of election administration.’ He adds that states retain ‘considerable leeway to protect the integrity and reliability of the initiative process.’ *Citing Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 191, 119 S. Ct. 636, 142 L.Ed.2d 599 (1999).

With respect to the second requirement, the concurrence concludes that ‘there is a fair prospect that the Court will set aside the District Court order.’ To this end, the decision provides:

\*\*3 This is not a case about the right to vote, but about how items are placed on the ballot in the first place... Nothing in the Constitution requires Idaho or any other State to provide for ballot initiatives... Even assuming that the state laws at issue implicate the First Amendment, such reasonable, nondiscretionary restrictions are almost certainly justified by the important regulatory interests in combating fraud and ensuring that ballots are not cluttered with initiatives that have not demonstrated sufficient grassroots support. (Internal citations omitted)

Lastly, the concurrence concludes that the State is likely to suffer irreparable harm absent a stay. In fact, Justice Roberts writes that, ‘[r]ight now, the preliminary injunction disables Idaho from vindicating its sovereign interest in the enforcement of initiative requirements that are likely consistent with the First Amendment.’ Responding to the dissenting opinion, Justice Roberts adds that the dissent fails to appreciate that ‘the initiative process is just one aspect of a primary and general election system facing a wide variety of challenges in the face of the pandemic.’ Given the extenuating circumstances that the pandemic presents, the concurrence expresses that ‘the District Court did not accord sufficient weight to the State’s discretionary judgments about how to prioritize limited state resources across the election system as a whole.’

Finding in favor of the stay, the concurrence also adds that ‘while a stay may preclude this particular initiative from appearing on the ballot this November, that consequence is attributable at least in part to Reclaim Idaho, which ‘delayed unnecessarily’ its pursuit of relief until more than a month after the deadline for submitting signatures.’

### The dissent.

Justice Sonia Sotomayor, joined by Justice Ruth Bader Ginsburg, wrote a dissenting opinion, criticizing the Court for intervening in a case ‘less than two weeks before the Court of Appeals for the Ninth Circuit is poised to hear an expedited appeal on[the] preliminary injunction entered by the District Court,’ and rejecting the State’s claim that it ‘requires immediate intervention from this Court because, absent a stay, it must expend time and resources verifying digital signatures in advance of the extended signature-submission deadline.’

According to the dissent, ‘the equities do not favor the State.’ Rather, as the dissent points out, ‘the Ninth Circuit will hear Idaho’s case on August 11, almost a month before Idaho’s Secretary of State must certify ballot questions to county clerks (on September 7), and almost three months before election day.’ In addition, the dissent argues that even ‘[i]f the District Court’s preliminary injunction turns out to have been improper, Idaho will still have time to omit respondents’ initiative from the November ballot.’ This, they maintain, is in contrast to the Respondents, given that the ‘stay granted today puts a halt to their signature-collection \*34 efforts, meaning that even if respondents ultimately prevail on appeal, it will be extremely difficult, if not impossible, for them to collect enough qualifying signatures by any reasonable deadline for the November ballot.’

\*\*4 While Justice Sotomayor recognizes that ‘the District Court’s preliminary injunction burdens Idaho’s county clerks with the task of verifying digital signatures during an already busy election year,’ she adds that ‘Idaho’s undeniable interest in vacatur of the preliminary injunction should be considered in the first instance by the Ninth Circuit, which must weigh the State’s temporary expenditure of resources against the significant First Amendment questions raised by respondents.’

The dissent also comments on policy, stating that this Court ‘takes the extraordinary step of staying the District Court’s preliminary injunction pending appeal.... [and] [i]n doing so, the Court dispenses liberally a ‘rare and exceptional’ remedy, one that this Court traditionally has granted ‘only upon the weightiest considerations,’ merely to address alleged harms that would exist in the mine-run of similar cases.’

The dissent concludes, stating that ‘[t]oday, by jumping ahead of the Court of Appeals, this Court once again forgets that it is ‘a court of review, not of first view,’ and undermines the public’s expectation that its highest court will act only after considered deliberation.’

### Taxpayer’s Challenge to Ohio’s and Ohio’s Tax Commissioner’s Immunity to Suit

In *State v. Great Lakes Minerals, LLC*, (Docket No. 20-24) ruling below at [597 S.W.3d 169 \(Ky. 2019\)](#), the Kentucky Supreme Court held that principles of sovereign immunity protected the State of Ohio and its Tax Commissioner, in his official capacity, from Great Lakes Minerals, LLC’s (‘Great Lakes’) claim for declaratory and injunctive relief in Kentucky court. The Kentucky Supreme Court also held that principles of immunity, together with the doctrine of comity, protect the Tax Commissioner, in his personal capacity, from a claim for monetary relief for the alleged forced collection of taxes not owed. The Court has been asked by Great Lakes to review these immunity and comity rulings.

### Background.

Great Lakes is a mineral processing company that sells minerals to customers at its Greenup County, Kentucky plant. As explained by the Kentucky Supreme Court, ‘Great Lakes maintains that it sells its products in Kentucky; all transactions, including payment and delivery of goods, occur in Kentucky; Great Lakes does not have a physical presence in Ohio; and Great Lakes neither directly nor indirectly delivers its products to the State of Ohio.’

However, Ohio ‘determined that between 2009 and 2016, Great Lakes sold over \$104 million in minerals that were then shipped to Ohio addresses.’ As a result, the Ohio Department of Taxation, Appellants, issued an assessment of Commercial Activity Tax

(‘CAT’) against Great Lakes for \$325,000. Great Lakes paid a portion of the CAT assessment and petitioned for reassessment, challenging the validity of the CAT to the company. One month later, Great Lakes brought this action against the state of Ohio and Joseph W. Testa, Ohio's Tax Commissioner, in his official and individual capacities, in Greenup Circuit Court.

**\*\*5** In the Circuit Court, ‘Great Lakes sought: (1) a declaratory judgement that it is not subject to Ohio's CAT; (2) monetary relief pursuant to [42 U.S.C.A. § 1983](#) for the forced collection of taxes not owed, in violation of the Ohio and U.S. Constitutions; and (3) a determination pursuant to CR 60.03 [Kentucky's Rules of Civil Procedure] that it would be inequitable to require Great Lakes to defend an action in a foreign state.’ The State of Ohio moved to dismiss Great Lakes' complaint on grounds of sovereign immunity, qualified immunity, comity, lack of personal jurisdiction and failure to exhaust **\*36** administrative remedies. The Greenup County Circuit Court ruled in favor of Great Lakes, thereby denying Ohio's Motion to Dismiss, and Ohio filed a Notice of Appeal with the Kentucky Court of Appeals. Ohio moved to transfer jurisdiction over the interlocutory appeal to the Kentucky Supreme Court, which granted the appeal. The Kentucky Supreme Court then abated the case pending the U.S. Supreme Court's decision in [Franchise Tax Board of California v. Hyatt](#), 139 S. Ct. 1485, 203 L.Ed.2d 768 (2019) (hereinafter ‘*Hyatt III*'). Following the U.S. Supreme Court's decision in *Hyatt III*, the Kentucky Supreme Court granted the State of Ohio's motion for leave to file supplemental briefs, and once briefed, the Kentucky Supreme Court issued its decision reversing the judgment of the Greenup Circuit Court, for the reasons discussed below, and remanding the case to the Greenup Circuit Court for dismissal of Great Lakes' claims.

#### **Sovereign immunity protection applies to actions for declaratory or injunctive relief.**

Appellants advanced as its defense that the Ohio Department of Taxation and Tax Commissioner Testa are protected by the doctrine of sovereign immunity, as trumpeted in [Franchise Tax Bd. of California v. Hyatt](#), (*‘Hyatt III’*). (139 S. Ct. 1485, 203 L. Ed. 2d 768 (2019)). (As readers of this Journal may recall, in *Hyatt III*, the U.S. Supreme Court held that the Franchise Tax Board of the State of California was protected by sovereign immunity and could not be sued in Nevada state court.) Great Lakes, however, contends that the protections of sovereign immunity do not extend to actions for declaratory or injunctive relief nor ‘to appellants in the capacity in which they were sued pursuant to [42 U.S.C.A. § 1983](#)...,’ an action for monetary relief, which it asserts is consistent with the Court's holding in *Hyatt II*. (In [Franchise Tax Board of California v. Hyatt](#), 136 S. Ct. 1277, 194 L.Ed.2d 431, referred to as ‘*Hyatt II*’, the U.S. Supreme Court reversed a monetary award against the Franchise Tax Board, that was greater than which Nevada would award in a similar suit against its own tax agency.)

However, the Kentucky Supreme Court rejected Great Lakes' application of *Hyatt II*, applying *Hyatt III* which it found ‘made no distinction between claims seeking monetary damages and claims seeking other types of relief.’ Moreover, finding that *Hyatt III* controls, the Kentucky Supreme Court concluded that, ‘[t]he Constitution ... embeds interstate sovereign immunity within the constitutional design,’ and held that the State of Ohio is protected by sovereign immunity.

**\*\*6** The Kentucky Supreme Court also concluded that Commissioner ‘Testa is entitled to the same sovereign immunity that protects the state of Ohio’, and therefore, it dismissed Great Lakes' claims against him in his official capacity.

#### **Tax Commissioner immune from suit in personal capacity under principles of comity.**

Great Lakes brought a claim for monetary relief pursuant to [42 U.S.C.A. § 1983](#) for the alleged forced collection of taxes not owed, in violation of the U.S. and Ohio constitutions, against the Ohio Tax Commissioner in his personal capacity. The Kentucky Supreme Court explained, citing to *Kentucky v. Graham*, that:

[t]o establish personal liability in a [§ 1983](#) action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right.... When it comes to defenses to liability, an official in a personal-capacity action may, depending on his position, be able to assert personal immunity defenses, such as objectively reasonable reliance on existing law.

The Kentucky Supreme Court further noted that the U.S. Supreme Court has ‘time and time again recognized that [42 U.S.C.A. § 1983](#) was not meant to effect a radical departure from ordinary tort law and the common-law immunities applicable in tortsuits.’ *Rehberg v. Paulk*, 566 U.S. 356, 361, 132 S. Ct. 1497, 182 L.Ed.2d 593 (2012). It also explained that these principles were recently affirmed by the Kentucky Supreme Court in *Martin v. O’Daniel*, 507 S.W.3d 1, 5 (Ky. 2016). In that case, per the Kentucky Supreme Court, ‘[a]s explained in *Rehberg*, the scope of immunity available to state government officials in a federal civil rights action under [\\*38 § 1983](#) derives from the state’s common law immunity doctrine.’ 507 S.W.3d 1, 5 (Ky. 2016). Thus, to determine whether Commissioner Testa, in his personal capacity, is immune from suit, the Kentucky Supreme Court ‘must turn to the common law doctrine of immunity...’ which would require the Kentucky Supreme Court to ‘not only to evaluate Testa’s actions but also to interpret Ohio tax law,’ presenting an issue of comity.

The Kentucky Supreme Court looked to U.S. Supreme Court precedence on the doctrine of comity, in particular its decision in *Fair Assessment in Real Estate Association v. McNary*, 454 U.S. 100, 102 S. Ct. 177, 70 L.Ed.2d 271 (1981). In *McNary*, the Supreme Court held that ‘taxpayers are barred by the principle of comity from asserting [§ 1983](#) actions against the validity of state tax systems in federal courts,’ including actions for damages.’ Although the Kentucky Supreme Court recognized that *McNary* addressed comity between federal and state courts, and not between state courts, the Kentucky Supreme Court felt ‘compelled to apply similar principles to the case at hand.’ Extending the reasoning of *McNary*, the Kentucky Supreme Court surmised that it was required to ‘determine whether Testa’s imposition of the CATS assessment on [Plaintiff] was consistent with Ohio law...’ which would be ‘intrusive [on the State of Ohio] and could disrupt Ohio’s state tax administration.’

**\*\*7** Concluding, the Kentucky Supreme Court commented that ‘Ohio’s state courts are better suited to efficiently evaluate and apply Ohio law to this issue... evaluate the facts, and to consider whether Testa caused the deprivation of a constitutional right while acting under the color of Ohio state law.’ Relying on *McNary* and the doctrine of comity, the Kentucky Supreme Court dismissed the action brought against Commissioner Testa in his personal capacity.

### Questions presented.

Great Lakes presents the following questions for the Court to review:

- 1 Whether the Court’s decision in *Franchise Tax Board of California v. Hyatt*, 139 S. Ct. 1485 (2019) [*Hyatt III*] extends a state’s sovereign immunity to declaratory and/or injunctive relief and to individuals sued in their individual capacity.
- 2 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.
- 3 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.

### Pending Petitions

We are continuing to track the petition for cert. filed with the Court in *Rogers County Bd. of Tax Roll Corrections v. Video Gaming Technologies*, (Docket No. 19-1298), ruling below at Okla. S. Ct. Docket No. 117491 (12/17/2019). Video Gaming Technologies, Inc. (‘VGT’) brought claims for relief that the local ad valorem tax on its gaming equipment was preempted by federal law - - the Indian Gaming Regulatory Act (‘IGRA,’ [25 U.S.C. §§ 2701-2721 \(2018\)](#)) and Indian Trader Statutes, and federal case law. The Oklahoma Supreme Court agreed with VGT and reversed the lower court’s order of summary judgment and remanded the matter to the district court to enter an order of summary judgment for VGT.

Rogers County Board of Tax Roll Corrections challenges the Oklahoma Supreme Court's decision, and presents the following question in its writ of certiorari:

Whether a generally applicable state *ad valorem* tax, as assessed against personal property owned by a non-Indian, out-of-state corporate entity and leased to a tribe for use in its casino operations, is preempted by the Indian Gaming Regulatory Act and the Court's 'particularized inquiry' balancing test, see *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), where the tax does not infringe on any federal regulatory purpose contained in the IGRA, the tax does not interfere with any tribal sovereignty interests, and the tax supports relevant and important government interests, such as law enforcement, schools and health services.

The Tulsa County Assessor John A. Wright filed a brief Amicus Curiae in support of Petitioners focusing on the state's 'legitimate interest in raising revenue from the uniform application of ad valorem tax laws.'

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