IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

AMERICAN CATALOG MAILERS ASSOCIATION,	:	
Plaintiff,	:	Case No. 17 CV 011440
v.	:	
	:	Judge Jeffrey M. Brown
JOSEPH W. TESTA, in his capacity as the Ohio Tax Commissioner, and the OHIO DEPARTMENT OF TAXATION,	:	
Defendants.	:	

ACMA'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS, OR ALTERNATIVELY, MOTION FOR STAY

Defendants Joseph W. Testa, Tax Commissioner of Ohio, and the Ohio Department of Taxation (collectively, "Commissioner"), moved to dismiss the Complaint for Declaratory Judgment ("Complaint" or "Compl.") filed by the American Catalog Mailers Association ("ACMA") on behalf of its affected retail members claiming that this Court lacks jurisdiction to hear this dispute and that the ACMA lacks standing to assert its claims. Both of these contentions are erroneous, as demonstrated by Ohio Supreme Court precedent.

The Complaint seeks a declaration that newly enacted provisions of R.C. § 5741.01(I)(2)(h) and (i) ("Statute"), as interpreted by the Department of Taxation in Information Release ST 2017–02 (Oct. 2017) ("ST 2017–02") violate the United States Constitution and the federal Internet Tax Freedom Act ("ITFA"). *See* Compl. ¶ 1. The Complaint

does not seek an injunction. Because the ACMA has standing to pursue these claims, and Ohio law permits them to be made in this Court, the Commissioner's Motion to Dismiss should be denied.

In the alternative, the Commissioner has moved for a stay of this action pending an opinion of the United States Supreme Court in *South Dakota v. Wayfair, Inc.*, Case No. 17–494 (*cert*. granted Jan. 12, 2018), in which the State of South Dakota has asked that Court to abrogate the holding of *Quill Corp. v. North Dakota*, 504 U.S. 298, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992). Although the outcome of *Wayfair* would not dispose of all issues in this case, the ACMA is not in principle opposed to a stay that does not prejudice either party. When asked to consent to a stay, the ACMA offered its consent on the condition that the Commissioner agree not to enforce the contested provisions of the Statute during the pendency of the stay, thereby eliminating any prejudice to the ACMA from a stay. The Commissioner refused, and now asks this Court to enter a stay that would prejudice the ACMA yet still not lead to the resolution of all disputed issues. Under those circumstances, that motion too should be denied.

BACKGROUND

In order to see the deficiencies in the Commissioner's motion, it is vital first to understand the claims the ACMA has actually made and the relief it actually seeks. In proper focus, these claims seek only declaratory relief—not damages or injunctive relief—for alleged violations of the Commerce Clause, the ITFA, and the Due Process Clause, all of which may be decided by this Court in this action.

The ACMA. The ACMA is the leading trade association in the United States representing the interests of companies, individuals, and organizations engaged in and supporting catalog marketing. Compl. ¶ 5. A number of its members market products over the Internet. *Id*.

Protecting its members from state laws and regulations that violate state and federal statutory and constitutional provisions is germane to the ACMA's purpose. *Id*. ¶ 12. The ACMA has at least one member that does *not* have a physical presence in Ohio, but would be required to register, collect, and remit Ohio sales and use tax under the requirements of the Statute, as interpreted by the Commissioner in ST 2017–02. *Id*. ¶ 11. Thus, the ACMA has a direct interest in challenging the legitimacy of the Statute as interpreted by the Commissioner.

The Statute. Ohio imposes a sales tax on the retail sale of certain tangible property and services, and a corresponding use tax on those goods and services purchased elsewhere for use in Ohio. Compl. ¶ 27. A seller located outside of Ohio must collect and remit the Ohio use tax if it makes sales at retail and has "substantial nexus" with Ohio. *Id*. ¶ 28; *see* R.C. §§ 5741.04 & 5741.17. In October 2017, the Commissioner issued ST 2017–02, which "describe[s] the nexus standards the Department of Taxation ('Department') will apply to determine whether an out–of–state seller is subject to Ohio's use tax collection responsibility under the nexus provisions [of R.C. § 5741.01(I)(2)(h) and (i)] enacted in Am. Sub. H.B. 49 of the 132nd General Assembly." *Id*. ¶ 32 (footnote omitted and brackets added).

In brief, the Statute sets forth new provisions of prospective application, binding on numerous out–of–state Internet sellers that are potentially subject to the Statute, including one or more ACMA members. Compl. ¶¶ 35 & 11.

The ACMA's Claims. The eight counts of the ACMA's declaratory judgment complaint allege three grounds for the Statute's invalidity: (1) Commerce Clause violations (Counts 1–3); (2) violations of the Internet Tax Freedom Act ("ITFA"), 47 U.S.C. § 151 (note), under the Supremacy Clause (Counts 4–6); and (3) Due Process violations (Counts 7–8).

Relief Sought. For these violations, the ACMA only seeks a declaration that the proposed enforcement of the Statute as interpreted by the Commissioner violates the Commerce Clause, the ITFA under the Supremacy Clause, and Due Process. *See* Compl., Prayer for Relief. The ACMA seeks neither damages nor injunctive relief in this action. *See id.* Nor has it asked this Court to command the Commissioner to perform or cease to perform any specific action. The ACMA simply seeks a declaration of the rights of its members with respect to the Statute.

In a nutshell, the ACMA, an association with members that are directly affected by the Statute as interpreted by the Commissioner, seeks a declaratory judgment that the Statute so read violates federal constitutional and statutory law. This straightforward challenge will require neither the participation of individual members of the ACMA nor the development of a complex factual record through discovery. To the contrary, it will require only the judicial application of established legal principles to the Commissioner's interpretation of the Statute. This is precisely the kind of direct and immediate constitutional challenge Ohio law authorizes.

ARGUMENT

"A Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted will only be granted where the party opposing the motion is unable to prove any set of facts that would entitle him to relief." *State ex rel. Bush v. Spurlock*, 42 Ohio St.3d 77, 80, 537 N.E.2d 641 (1989) (citation omitted). "To make this determination, the court is required to interpret all material allegations in the complaint as true and admitted." *Id*. (citation omitted). In ruling on a Rule 12(B)(6) motion, "a trial court may consider only the statements contained in the pleadings, and may not consider any evidentiary materials." *Estate of Sherman v. Millhon* 104 Ohio App.3d 614, 617, 662 N.E.2d 1098 (10th Dist.1995) (citation omitted). Lack of standing, which challenges the capacity of a party to bring an action, is properly raised in a

Civ.R. 12(B)(6) motion, and the same standard applies. *See Brown v. Columbus City Schools Bd. of Educ.*, 10th Dist. Franklin No. 08AP-1067, 2009–Ohio–3230, ¶ 4; *see also Building & Const. Trades Council of Buffalo, N.Y. and Vicinity v. Downtown Dev., Inc.*, 448 F.3d 138, 144 (2d Cir. 2006).

"The standard of review for a dismissal pursuant to Civ.R. 12(B)(1) is whether any cause of action cognizable by the forum has been raised in the complaint." *Bush*, 42 Ohio St.3d at 80 (citations omitted). While a court may consider material attached to a motion to dismiss for lack of personal jurisdiction, *see Southgate Dev. Corp. v. Columbia Gas. Transmission Corp.*, 48 Ohio St.2d 211, 214, 358 N.E.2d 526 (1976), the Commissioner has attached no such materials, and so the Court's analysis of the jurisdictional arguments is confined to the allegations of the Complaint.

I. THE ACMA HAS STANDING.

The Commissioner erroneously claims that ACMA lacks standing. *See* Motion at 17–22. "An association has standing on behalf of its members when (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *State ex rel. Am. Subcontractors Ass'n, Inc. v. Ohio State Univ.*, 129 Ohio St.3d 111, 2011–Ohio–2881, 950 N.E.2d 535, ¶ 12 (quotation and citations omitted). The same standard is applied by the federal courts. *See Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975); *Hunt v. Washington State Apple Advertising Comm.*, 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977); *see also Ohio Contractors Ass'n v. Bicking*, 71 Ohio St.3d 318, 320, 643 N.E.2d 1088 (1994). The Commissioner does not dispute that elements (a) or (b) are met. At least one ACMA member would be directly affected by

implementation of the Statute because it meets the criteria set out in the Statute and ST 2017–02, and so, having suffered a cognizable injury, would have standing to sue in its own right. *See* Compl. ¶ 11. Further, there is no dispute that the protection of its members against unlawful and/or unconstitutional tax statutes is germane to the ACMA's purpose. *See id*., ¶ 12.

The Commissioner's sole argument against the ACMA's standing is that the claims asserted require the participation of individual ACMA members. *See* Motion at 18–19. This argument is premised, however, on a misapprehension of the claims, none of which requests or requires individualized relief. Rather, individual participation is *not* required in cases like this one, in which "[t]he outcome of the case does not turn on factual matters that are unique to certain individual members." *In re 730 Chickens*, 75 Ohio. App.3d 476, 485, 599 N.E.2d 828 (4th Dist. 1991) (brackets added). Here, as in *730 Chickens*, "[t]he questions before the trial court…are essentially legal in nature, not factual." *Id*. (brackets and ellipsis added).

The ACMA is seeking a declaration from this Court that the Statute as interpreted by the Commissioner is unconstitutional and violates the ITFA. This claim applies equally to all affected members of an association. *See id*. (association challenged authority of trial court to order destruction of seized property under statutory scheme in violation of due process and statutory notice rights); *OAPSE/AFSCME Local 4 v. Berdine*, 174 Ohio App.3d 46, 53–54, 2007-Ohio-6061, 880 N.E.2d 939 (8th Dist.) (union sought writ of mandamus to compel city school district board of education to separate positions and job duties of treasurer and director of support services).

Neither the substantive nature of the claim nor the form of the relief sought requires the participation of individual members. *See Bano v. Union Carbide Corp.*, 361 F.3d 696, 715 (2d Cir. 2004). "[W]here the organization seeks a purely legal ruling without requesting that the []

court award individualized relief to its members, the *Hunt* test may be satisfied." *Bano*, 361 F.3d at 714 (brackets added). The ACMA does not seek damages on behalf of individual members, which might have to be calculated separately. *See 730 Chickens*, 75 Ohio. App.3d at 485; *Bano*, 361 F.3d at 714–15 (association lacked standing to pursue claims of damages for personal bodily harm on behalf of members).

The ACMA does seek a declaratory judgment regarding the viability of the Statute without regard to its specific application to any particular affected member. *See Building & Const. Trades Council*, 448 F.3d at 150 ("Here, because the Trades Council seeks civil penalties and injunctive relief only, not money damages, its claims do not require 'individualized proof.'"). "Declaratory, injunctive, or other prospective relief will usually inure to the benefit of the members actually injured and thus individualized proof of damages is often unnecessary." *Retired Chicago Police Assn' v. City of Chicago*, 7 F.3d 584, 603 (7th Cir. 1993) (citing *Warth*, 422 U.S. at 515).

The Commissioner's erroneous citation to a footnote in a District of Columbia district court ruling, which the Commissioner misidentifies as a Circuit Court of Appeals opinion, only *proves* the ACMA's point. *See* Motion at 19 (misciting *Cmty. Fin. Servs. Ass'n of Am., Ltd. v. FDIC*, D.D.C. No. 14-CV-953(GK), 2016 WL 7376847, *7 n.7 (Dec. 19, 2016)). *First*, that decision notes that element (c) of the *Hunt* test may be satisfied "even though some minimal degree of member participation is necessary." *Id*. at *6. *Second*, that case affirms, "Courts have repeatedly held that the third prong of *Hunt* is not violated where the claim involves a question of law." *Id*. at *7 (collecting cases). *Third*, the court noted that courts have routinely found associational standing even where sampling of members is required "where the sample evidence focuses on the conduct of the defendant to establish a violation of law, rather than on the extent

of plaintiff's injuries." *Id*. In this case, the only question posed by the ACMA is whether the Statute as interpreted by the Commissioner satisfies the legal requirements of the Commerce Clause, the ITFA, and the Due Process Clause. The claims create no question of fact special or unique to any individual member.

The Commissioner's argument founders on the erroneous assertion that the ACMA has asserted an "as–applied" challenge to the Statute. *See* Motion at 19. Nothing about the ACMA's claim requires the development of different facts about different affected members of the ACMA. Under the Statute as the Commissioner reads it, any taxpayer who meets certain threshold requirements and creates certain "virtual" contacts with Ohio must collect and remit use tax. The nature of the contacts of any particular ACMA member cannot and will not change the Court's analysis of, *e.g.*, whether any such "virtual" contacts satisfy the *Quill* physical presence test—which they do not, because any such "virtual" presence is by definition not an actual physical presence. Nor is such differentiation required to address the ITFA claims, all of which relate to whether the Statute as interpreted by the Commissioner discriminates against electronic commerce. Again, the answer to that question cannot and will not and turn on the nature of any individual ACMA's e–commerce website. Indeed, it is telling that the Commissioner's brief seeking dismissal of the ITFA claims on various grounds fails to mention or cite the ITFA at all. He wants to avoid the claims, but cannot muster a specific argument why they should not be decided. Instead, the Commissioner offers a list of red herring "individualized inquiries," none of which is relevant to the issues actually raised. *See* Motion at 20–21. The ACMA has not requested injunctive relief. *See id*. at 20. The ACMA has not challenged Ohio nexus law under other statutory or regulatory provisions. *See id*. at 20–21. The ACMA has not argued that affected members can or need to rebut the presumption of taxability on any other

ground. *See id*. at 21. The ACMA *has* averred that at least one of its members satisfies the requirements of the Statute, including the taxable gross receipts total requirement. *See* Compl. ¶ 11. That is sufficient to establish the association's standing to bring this lawsuit.

II. THIS ACTION IS NOT BARRED BY THE TAX ANTI–INJUNCTION STATUTE.

Pursuant to R.C. § 2721.03, "any person whose rights, status, or other legal relations are affected by…a statute…may have determined any question of construction or validity arising under…statute…and obtain a declaration of rights, status, or other legal relations under it." *Id*. (ellipses added). The Supreme Court has expressly held that Ohio courts have jurisdiction under section 2721.03 to adjudicate a direct challenge to the validity or constitutionality of a tax statute, notwithstanding the Tax Anti–Injunction Act, R.C. § 5703.38. *Herrick v. Kosydar*, 339 N.E.2d 626, 339 N.E.2d 626 (1975); *see also Fairview General Hospital v. Fletcher*, 63 Ohio St.3d 146, 149, 586 N.E.2d 80 (1992) (declaratory judgment action authorized under *Herrick* where the "only claim presented in a declaratory judgment action is the validity or constitutionality of a statute.").

Since *Herrick*, constitutional challenges to tax statutes, like that stated here, have been initiated and taken to judgment in the Common Pleas Court of Franklin County as declaratory judgment actions. See, e.g., *Ohio Grocers Assoc. v. Wilkins*, Franklin Cty. C.P. No. 06C VH02-2278 (Aug. 24, 2007), *rev'd on other grounds*, 178 Ohio App.3d 145, 2008-Ohio-4420, 897 N.E.2d 188 (10th Dist.), *aff'd*, 123 Ohio St.3d 303, 2009-Ohio-4872, 916 N.E.2d 446; *Beaver Excavating Co. v. Levin*, Franklin Cty. C.P. No. 08CV-3921, Judgment (May 18, 2010), *aff'd*, 10th Dist. Franklin No. 10AP-581, 2011-Ohio-3649, *rev'd sub nom. on other grounds, Beaver Excavating Co. v. Testa*, 134 Ohio St.3d 565, 2012-Ohio-5776, 983 N.E.2d 1317; *Couchot v. Ohio State Lottery Comm'n*, 71 Ohio App. 3d 371, 375, 594 N.E.2d 42 (10th Dist.1991) (due

process challenge to income tax); *Weidner v. State Lottery Comm'n*, 10th Dist. Franklin No. 92AP-657, 1992 WL 344938, *3 (Nov. 19, 1992) (constitutional challenge to income tax); *AirTouch Paging v. Tracy*, 111 Ohio App. 3d 202, 207-08, 675 N.E.2d 1305 (10th Dist.1996). Under *Herrick* and its progeny, the ACMA's challenge may, indeed must, be permitted to proceed, as it is a preferable vehicle to test the mettle of the Statute.

In *Herrick*, the plaintiff class sought "a declaration as to the plaintiff's liabilities arising from a state statute which [wa]s claimed to be invalid," specifically, a tax statute. 44 Ohio. St.2d at 130 (brackets added). The Supreme Court held,

> The case is within both the letter and the spirit of R.C. 2721.03; it presents a real controversy between plaintiffs and the state which is justiciable in character; and speedy relief is necessary to preserve the plaintiffs' right to refuse to pay the taxes mandated by statute.

Id. That is, a large class of plaintiffs sought to challenge the validity of a state tax statute *before* it could be applied to require them to pay the allegedly invalid taxes. The Supreme Court found the declaratory judgment action filed on behalf of the plaintiff class not only to be a permissible avenue for the plaintiffs, but a preferable one, because a declaratory judgment was "clearly a superior remedy" under the circumstances. *Id*. Their claim was that the statute was unconstitutional, and so beyond the scope of administrative proceedings before the Department of Taxation. That feature of the claim rendered any actual administrative proceedings merely "futile preludes to the assertion of plaintiffs' actual claim in a later appeal to the courts." *Id*. Further, a class action, which put the claims of 40,000 potentially affected claimants before the court in a single action, avoided the need for separate adjudication of each of the tens of thousands of substantively identical administrative challenges. *See id*. at 130–31.

Those advantages are reproduced precisely in this action. The ACMA, a member organization, seeks an adjudication of the validity of the Statute on constitutional and federal

statutory grounds in a form that will instruct and benefit all potentially affected parties regarding the legitimacy of the Statute under the Commissioner's interpretation. The relief the ACMA seeks is exclusively declaratory as to each of the Commerce Clause, ITFA, and Due Process claims. *See* Compl., Prayer for Relief. *Herrick* controls, and authorizes the filing and adjudication of this action.

The Commissioner's efforts to limit *Herrick* to "facial" constitutional challenges must fail. *See* Motion at 6–7. *First*, and most significantly, there is no language in *Herrick* to suggest that its holding was so limited. Indeed, *Herrick* drew the legal principle on which its holding is based from the case of *American Life & Accident Insurance Co. of Kentucky v. Jones*, 152 Ohio St. 287, 89 N.E.2d 301 (1949), a challenge by an individual under the Unemployment Compensation Act for a declaration of rights and other incidental relief. *See Herrick*, 44 Ohio St.2d at 130 ("The present case seeks a declaration as to the plaintiffs' liabilities arising from a state statute which is claimed to be invalid, and is *identical in principle* to *American Life & Accident Ins. Co., supra*.") (emphasis added). *American Life* did *not* involve a constitutional challenge *at all*. Thus, the rule of law undergirding *Herrick*—which is "identical in principle" to that applied in *American Life*—necessarily extends to statutory as well as constitutional challenges.

Second, *Herrick* makes no mention of any intent to treat facial and as–applied constitutional challenges differently for purposes of establishing declaratory judgment jurisdiction. In fact, the Tenth District Court of Appeals has determined that even an "as applied" challenge may be pursued in a declaratory judgment action. *Couchot*, 71 Ohio App. 3d at 375 (allowing "as applied" challenge to proceed as declaratory judgment action as "more expedient remedy," citing *Herrick*). The Commissioner cherry–picks *dicta* in a later case, *State ex rel.*

Columbus Southern Power Co. v. Sheward, 63 Ohio St.3d 78, 585 N.E.2d 380 (1992), which characterizes the plaintiff class in *Herrick* as "seeking a declaratory judgment that certain amended tax statutes were unconstitutional on their face." *Id*. at 81; *see* Motion at 6–7. Even the court in *Columbus Southern Power*, however, did not draw any legal conclusion from its conclusion that *Herrick* did not involve an as–applied challenge. Rather, that court followed *Herrick* in concluding that a judge of the Franklin County Court of Common Pleas was within his authority to issue a temporary restraining order against a power company's implementation of proposed rates pending judicial review of the constitutional validity of the statute authorizing them. *See* 63 Ohio St.3d at 80. The declaratory judgment action was proper, that court noted, because the relief requested "did not interfere with the commission's rate–making authority" by seeking to require the Court of Common Pleas "to establish just and reasonable rates…or to review an order of the commission which purports to do so." *Id*. (ellipsis added). "Rather," the Supreme Court continued, "they are seeking a declaratory judgment that R.C. 4909.42 is unconstitutional. Such a finding would impair no order or other authority of the commission." *Id*. It was the nature of the relief sought, and its non–interference with agency action, that decided the issue, not the nature of the constitutional challenge, whether facial or as–applied.

Third, the ACMA has not made an as–applied challenge to the Statute. The ACMA's allegation is not that the Statute "is unconstitutional as applied to a particular set of facts." Motion at 7. The allegation is that the Statute as construed by the Commissioner creates use tax nexus based on "virtual" activity, which is prohibited by the Commerce Clause and Due Process Clause, and, moreover, violates the federal ITFA. The ACMA's claims are not dependent on the activity of any individual taxpayer, but rather are based on the statutory language as read by the Commissioner. Accordingly, the Commissioner's extensive discussion of the case law governing

when a party must bring a facial challenge versus an as–applied challenge is a needless diversion. *See* Motion at 7–8. *Herrick* affirms that the ACMA has a vehicle to pursue declaratory judgment relief in this Court. The ins and outs of administrative process are neither here nor there.

Finally, the applicability of *Herrick*, and inapplicability of the tax anti–injunction statute, is further driven home by the fact that the ACMA is not seeking injunctive relief. *See* Compl., Prayer for Relief. The Commissioner argues that a declaratory judgment must be accompanied by a request for injunctive relief. *See* Motion at 6. Once again, the Commissioner misreads the case law. In *State ex rel. Gen. Motors Corp. v. Indus. Comm.*, 117 Ohio St.3d 480, 2008–Ohio–1593, 884 N.E.2d 1075, the Supreme Court made plain that "when a party files an action for declaratory judgment pursuant to R.C. 2721.02, the party seeks merely a declaration of its 'rights, status, and other legal relations whether or not further relief is or could be claimed.'" *Id*., ¶ 10 (quoting *State ex rel. Ohio Civ. Servs. Emps. Ass'n, AFSCME, Local 11, AFL–CIO v. State Emp. Relations Bd.* ("*OCSEA*"), 104 Ohio St.3d 122, 2004–Ohio–6363, 818 N.E.2d 688, ¶ 16). That is the relief the ACMA seeks: a declaration of its rights, status, and legal relations under the Statute, which it alleges to be unconstitutional and in violation of the ITFA.

In *General Motors*, the case presented an additional question that makes it plainly distinguishable. The plaintiff there sought a writ of *mandamus*, *i.e.*, a judicial directive to a state agency mandating that it take certain actions. In that context, a declaration of rights could *not* by itself compel agency action; only injunctive relief could do so. It is only in that context that the Court wrote that for a party seeking *mandamus* relief, "[s]tanding alone, a declaratory judgment cannot compel a government official to perform a specific legal duty." 117 Ohio St.3d 480, ¶ 10 (quoted in Motion at 6) (brackets added). In this case, by contrast, the ACMA is not asking the

Court to tell the Commissioner to take or not take a certain action; it is simply asking the Court to adjudicate whether the Statute as interpreted by the Commissioner is unconstitutional and/or violates the ITFA.

III. SUBJECT MATTER JURISDICTION IS PROPER.

The Commissioner also makes a series of arguments that the ACMA is somehow bypassing or ignoring special or mandatory administrative procedures. That is not the case.

A direct challenge to the validity of a tax statute need not be brought through an administrative challenge to a tax assessment issued by the Commissioner. A declaratory judgment action is a suitable vehicle for such a challenge. Indeed, as a trade association with standing to pursue the asserted claims, this action is the *only* appropriate vehicle for the ACMA to obtain declaratory relief. The ACMA is not subject to assessment, and so cannot make use of the administrative procedures that apply to taxpayers challenging particularized assessments or claiming refunds after payment, a point the Commissioner concedes. *See* Motion at 14 ("the association would have no right to administrative remedies").

This action does not bypass special statutory procedures, as the Supreme Court has determined in *Herrick.* The Commissioner cites *State ex rel. Albright v. Ct. of Common Pleas,* 60 Ohio St.3d 40, 572 N.E.2d 1387 (1991), for the general proposition that actions for declaratory judgment are not appropriate if special statutory proceedings would be bypassed. *See* Motion at 9. Once again, the Commissioner's own case law disproves his point. In *Columbus Southern Power*, the Court decided this precise issue, applying *Herrick* and expressly distinguishing *Albright*. The distinction that made the difference was that the plaintiff class was

> not requesting [the] respondent [trial judge] to establish just and reasonable rates for [the Columbus Southern Power Company], or to review an order of the commission which purports to do so. Rather, they are seeking a declaratory judgment that R.C. 4909.42 is unconstitutional. Such a finding would impair no

> order or authority of the commission. Accordingly, we distinguish this case from *Albright*, *supra*., in which we prohibited a declaratory judgment and injunction action by a board of county commissioners that would have bypassed statutorily prescribed annexation proceedings *and thus impaired the exclusive authority of another board of county commissioners to conduct those proceedings*.

63 Ohio St.3d at 80–81 (brackets and emphasis added). Here, the ACMA is not seeking a judicial order directing the Commissioner to do or refrain from any particular action. It is rather "seeking a declaratory judgment that [the Statute] is unconstitutional" and violates the ITFA. *Southern Columbus Power* holds that, in that circumstance, the rule of *Herrick*, not *Albright*, applies. The legal legitimacy of the Statute is not the kind of specialized tax question best left to the agency; nor an effort to enjoin enforcement actions; nor an attempt to adjudicate a statutory violation—the examples the Commissioner relies on. *See* Motion at 10–11.

Nor does the ACMA have an equally serviceable remedy in the Board of Tax Appeals. *See* Motion at 12–14. As noted, the ACMA does not have administrative remedies available to it. And, the agency cannot adjudicate constitutional issues. As *Herrick* states,

> it is well established that an administrative agency is without jurisdiction to determine the constitutional validity of a statute. *S.S. Kresge Co. v. Bowers* (1960), 170 Ohio St. 405, 166 N.E.2d 139. Thus, administrative proceedings in this case would be futile preludes to the assertion of plaintiffs' actual claim in a later appeal to the courts. Administrative proceedings could not provide or even consider the relief sought by these plaintiffs. *Cf. Driscoll v. Austintown Associates* (1975), 42 Ohio St.2d 263, 328 N.E.2d 395.

44 Ohio St.2d at 130. The agency's inability to decide constitutional issues is precisely why the Supreme Court recognized that declaratory relief in a court action is not only an available form of relief, but a superior one. In making a challenge to the core validity of the Statute, the ACMA need not make use of unavailable and unavailing administrative procedure.

IV. THE ACMA NEED NOT EXHAUST ADMINISTRATIVE REMEDIES.

In similar fashion, *Herrick* makes short work of the Commissioner's assertion that the ACMA was required to exhaust administrative remedies that it does not have and which could not provide the relief requested anyway.

As an initial matter, failure to exhaust is an affirmative defense. *See Telsat, Inc. v. Micro Center, Inc.*, 10th Dist. Franklin No. 10AP-229, 2010–Ohio–5628, ¶ 16 (cited in Motion at 14) (exhaustion of remedies an affirmative defense). As a threshold matter, affirmative defenses cannot be raised in a Civ. R. 12(B)(6) motion to dismiss. *See Reasoner v. City of Columbus*, 10th Dist. Franklin No. 02AP-831, 2003–Ohio–670, ¶ 12.

Be that as it may, *Herrick* shows the failure to exhaust argument to be inapplicable. The critical language of *Herrick* states that, in a case challenging the legitimacy of a statute, any administrative proceedings are merely "futile preludes to the assertion of plaintiffs' actual claim in a later appeal to the courts." 44 Ohio. St.2d at 130; see also e.g., *Cahill v. Ohio Tax Commissioner,* 2016-Ohio-7648, 86 N.E.3d 357, ¶ 26 (11th Dist.) ("a party raising non-constitutional claims must exhaust any applicable administrative remedies but the "failure to exhaust administrative remedies is not a prerequisite to an action raising a constitutional challenge to agency action.").

Under *Herrick* and subsequent cases, the ACMA may maintain a declaratory judgment action asserting the three sets of claims it has made here, all of which go to the underlying validity of a state statute, not the conduct of the Commissioner with respect to any particular taxpayer. This is not a sales tax refund case. *See Telsat,* 2010–Ohio–5628, ¶ 28. It is a case asserting that the Statute as interpreted by the Tax Commissioner is constitutionally infirm and

contrary to federal law. Those are not issues the agency could take up in the first, last, or any instance.

Indeed, the Commissioner dooms his own argument by noting that a futile administrative remedy need not be pursued. *See* Motion at 15 (citing *Morris v. Morris*, 2d Dist. Clark No. 2003-CA-94, 2004–Ohio-6059, ¶ 35). That is correct. "[I]f there is no administrative remedy available which can provide the relief sought, or if resort to administrative remedies would be wholly futile, exhaustion is not required." *Karches v. City of Cincinnati*, 38 Ohio St.3d 12, 17, 526 N.E.2d 1350 (1988) (citations omitted). In *Karches*, the Supreme Court held that exhaustion of administrative remedies would be futile in a constitutional challenge to the application of riverfront zoning to their property, because neither the city zoning official nor zoning board of appeals had the authority to grant a variance to allow the use sought. 38 Ohio St.3d at 17–18. Thus, the Court held that the plaintiffs had the right to seek relief directly in court. *Id*. That is the case here. The ACMA cannot obtain relief from the Commissioner because the agency lacks the authority to adjudicate constitutional challenges.

The holding of *Arbor Health Care Co. v. Jackson*, 39 Ohio App.3d 183, 530 N.E.2d 928 (10th Dist.1987), cannot aid the Commissioner. *Arbor Health*, which involved a challenge to the Director of the State Health Planning and Development Agency's certificate of need process, distinguished *Herrick* on grounds that show precisely why *Herrick* applies here. In *Arbor Health*, the plaintiff was required to pursue its administrative remedies because it sought "a declaration of its constitutional rights *in addition to a declaration of its statutory rights under the administrative procedure*." 39 Ohio App.3d at 186 (emphasis added). In other words, *Arbor Health* represents a challenge to how the agency was engaging in its administrative procedure, both on statutory and constitutional grounds. It was conceivable, then, that the agency or a

reviewing court might adjudicate the dispute without reaching the constitutional issues. By contrast, "[t]he court in *Herrick* found that the declaratory relief sought was a superior remedy to the administrative proceeding inasmuch as the relief sought there rested solely on a constitutional claim. Since an administrative agency could never provide the relief sought, declaratory relief was appropriate." *Id*. (brackets added and citation omitted). The class in *Herrick* did not assert that the administrative procedure had been unlawfully applied to them, but rather that a tax statute that would require them to pay taxes was illegitimate. Once again, this case lines up squarely with *Herrick*.

Lastly, the ACMA agrees with the Commissioner, when he quotes from *Fairview*, 63 Ohio St.3d at 149: "'Furthermore, the Court has made it clear that declaratory judgment is available when the "*only* claim presented in a declaratory judgment action is the validity or constitutionality of a statute."'" Motion at 17 (quoting *Fairview* discussing *Herrick*). Where the Commissioner errs is in thinking that this quotation does not confirm the validity of this action. The ACMA may challenge the validity *or* constitutionality of the Statute in this action if it does not bring any other claims. The disjunction proves that *Fairview* understands *Herrick* to contemplate challenges to the legitimacy of a statute on constitutional *or* other grounds, such as conflict with a federal statute applicable under the Supremacy Clause. A review of the ACMA's Prayer for Relief does not disclose any request for injunctive relief or damages, as the Commissioner falsely states. *Compare* Compl., Prayer for Relief *with* Motion at 17. The ACMA asks this Court to adjudicate the rights of its members under a statute that plainly violates federal constitutional and statutory commands—nothing more, nothing less. Nothing the Commissioner has said demonstrates that the ACMA may not do so in this action. Its motion to dismiss should be denied.

V. A PREJUDICIAL STAY IS NOT WARRANTED.

In the alternative, and without citing any applicable legal standard, the Commissioner asks the Court to order a stay of this action pending briefing, argument, and the issuance of an opinion of the United States Supreme Court in *Wayfair*. *See* Motion at 22–25. The determination whether to stay a proceeding rests in the discretion of the court. *See State ex rel. Charvat v. Frye*, 114 Ohio St.3d 76, 2007–Ohio–2882, 868 N.E.2d 270, ¶16. In considering whether to grant a stay, the court should consider the prejudice to the parties, whether an effective judgment can still be rendered, and whether the stay is necessary to avoid unnecessary costs or delay." *Huber v. Lincoln Benefit Life Co.*, 2d Dist. Montgomery No. 26570, 2015–Ohio–3390, ¶ 11. In this action, a stay pending the outcome of *Wayfair*, whatever it may be, would prejudice the ACMA without disposing of all of its claims.

First, the outcome in *Wayfair* will not be dispositive. While the Department is correct that the question presented in *Wayfair* is whether the Supreme Court should abrogate the holding of *Quill Corp. v. North Dakota*, 504 U.S. 298, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992), the answer to that question does not resolve this dispute. To begin with, as the law now stands, *Quill* is controlling precedent. If the Supreme Court affirms *Quill*—a precedent whose governing rule has been the law for 50 years—or declines to overrule *Quill* on justiciability or other grounds, a stay will have accomplished nothing but needless delay. If the Supreme Court takes any other approach, it will, at most, eliminate a single disputed issue from this case (*i.e.*, *Quill*). The Court will still have to decide the ITFA and Due Process claims. These issues will remain live whatever the outcome of *Wayfair*.

Second, the Commissioner's own position is that the assessment is valid under the current state of the law. Indeed, the Commissioner contends that the ACMA's Complaint "is largely

based on its mistaken assertion that the statutory provisions at issue do not accord with the Supreme Court's dormant Commerce Clause decision in *Quill*….The Commissioner disagrees…." Motion at 22 (ellipses added). That is effectively an argument that the Statute is valid with or without *Quill*, and, thus, an argument *against* a stay. The Commissioner's speculation that expensive discovery will be required is belied by the nature of the ACMA's claims, which turn exclusively on what the Statute and ST 2017–02 say, not on what certain ACMA members do.

Third, the ACMA will be prejudiced by delay. The Statute is presently in effect. The ACMA contends the Statute violates the Commerce Clause, the ITFA, and the Due Process Clause on its own terms. The ACMA and its members should not have to endure months of economic uncertainty because the Supreme Court has agreed to take up an issue that may or may not address one of three sets of issues the ACMA has raised. The state of the law now, including but not in the least limited to *Quill*, requires that the Statute be declared invalid and unenforceable.

That said, the ACMA would not oppose a non–prejudicial stay. Earlier in the litigation, in response to the Commissioner's inquiry whether the ACMA would agree to a stay pending the outcome of *Wayfair*, the ACMA indicated that it would agree to a true cease–fire—that is, a stay of this action brought by the ACMA on the condition that the Commissioner agree not to enforce the Statute during the pendency of the stay. The Commissioner would not agree. To the extent the Court believes a stay of these proceedings has the potential to simplify the issues in this case, the ACMA respectfully submits that any stay should suspend enforcement of the Statute for the duration of the stay. Such an agreement would provide the arguable advantages sought by the Commissioner without imposing the asymmetrical harm described above on the ACMA.

CONCLUSION

Based on the foregoing, the ACMA respectfully requests that the Court deny the Commissioner's motion to dismiss and alternative motion to stay.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 12, 2018 I electronically filed the foregoing with the Clerk of the Court by using the e–Filing system, which will send a notice of electronic filing to all counsel of record.

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