IN THE SUPREME COURT OF OHIO

ACORDIA OF OHIO, LLC, Appellant, v. MICHAEL FISHEL, JANICE FREYTAG, MARK TABER, SHEILA DIEFENBACH, NEACE LUKENS INSURANCE AGENCY, LLC, NEACE & ASSOCIATES INSURANCE AGENCY OF OHIO, INC., and JOSEPH T. LUKENS, Appellees.	Supreme Court Case No. 11-0163 On Appeal from the Hamilton County Court of Appeals, First Appellate District Court of Appeals Case No. C100071

MERIT BRIEF OF *AMICI CURIAE*, OHIO CHAMBER OF COMMERCE, OHIO CHEMISTRY TECHNOLOGY COUNCIL, USI HOLDINGS CORP., USI MIDWEST, INC., WILLIS OF OHIO, INC., AND HYLANT GROUP, INC. IN SUPPORT OF APPELLANT

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INTRODUCTION

> Upon consolidation of several railroads under authority of and in accordance with the provisions of Ohio statutes, the nominal existence of the several constituent companies is terminated, but their substantial existence is perpetuated by being merged in the consolidated company.
>
> *Citizens' Savings & Trust Co. v. Cincinnati & Dayton Traction Co.* (1922), 106 Ohio St. 577, 140 N.E. 380, at paragraph 9 of the syllabus.

> The doctrine of merger rather than the theory of a new, separate and distinct corporation must be weighed and considered .... And when the two doctrines are joined the conclusion is irresistible that the consolidated company merely steps into the shoes of the constituent companies.
>
> *Marfield v. Cincinnati, Dayton & Toledo Traction Co.* (1924), 111 Ohio St. 139, 164, 144 N.E. 689.

This appeal presents the question of whether a restrictive covenant is enforceable by a successor corporation following a corporate merger, consolidation, or conversion. The First District Court of Appeals refused to enforce the agreement following a corporate merger. The court decided that the merger ended the existence of the original corporate employer, thereby terminating the employment relationship and starting the running of the time period of the restrictive covenant. The First District's conclusion is wrong and its decision is injurious to Ohio's business climate. It has been the law in Ohio for a century and a half that the surviving corporate entity to a merger or consolidation steps into the shoes of the constituent entities and is entitled to enforce their contracts, as if those constituent entities were enforcing those contracts. The First District's decision departs from that fundamental rule. In doing so, it undermines predictability and adds burden to business transactions that Ohio needs for its economic health.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The Ohio Chamber of Commerce ("Chamber"), founded in 1893, is Ohio's largest and most diverse business advocacy organization. It promotes and protects the interests of its 4,000 business members while building a more favorable Ohio business climate. As an independent and informed point of contact for government and business leaders, the Chamber is a respected participant in the public policy arena. The Chamber's advocacy efforts are directed to creation of a strong pro-jobs environment and a business climate responsive to expansion and growth.

The Ohio Chemistry Technology Council ("OCTC"), formerly the Ohio Chemical Council, is a trade association representing over 80 chemical industry and related companies doing business in Ohio. The OCTC engages in activities to support its members' efforts to maintain and expand their business operations in Ohio. Given the large number of mergers, acquisitions, and divestitures in the chemical industry, the issue of maintaining enforceability of non-compete agreements in mergers is an important one to the OCTC's members.

USI Holdings Corp. ("USI Holdings") distributes property and casualty insurance, employee health and welfare insurance, financial products, and related administrative and consulting services. Its clients are primarily small and mid-sized businesses. Founded in 1994, USI Holdings has grown to become the eighth largest insurance broker (by annual revenue) in the country. USI Holdings has built a national distribution system through the acquisition, consolidation, and integration of nearly 120 insurance brokers and related businesses.

USI Midwest, Inc. ("USI") is an Ohio corporation and a subsidiary of USI Holdings. USI is an insurance agency and a competitor of Appellant Acordia of Ohio, LLC ("Acordia"). It has grown substantially by acquisition of other agencies. The issues presented in this case are of critical importance to USI and USI Holdings because they, like insurance agencies throughout Ohio, rely on restrictive covenants to protect their investment in their employees and customers.

Willis of Ohio, Inc. ("Willis") is a leading insurance broker, handling risk management and brokerage services across a wide range of service areas and industries. Through the acquisition of other insurance brokers, Willis has grown to be one of the largest insurance brokers in Ohio. It also is a competitor of Appellant Acordia. Given that mergers and acquisitions occur frequently in the insurance brokerage industry, the issue of maintaining the enforceability of restrictive covenants is critical to Willis.

Hylant Group, Inc. ("Hylant") is an Ohio corporation that distributes property and casualty insurance, employee health and welfare insurance, financial products, related administrative and consulting services, as well as all private line insurance products. Since 1935, Hylant has grown to become one of the larger privately-held insurance brokers in the country. With 12 offices in four states, the Hylant footprint dominates the mid-west market of the United States, and has built its size and reputation through strategic acquisition, consolidation, and integration of other insurance brokers and related consulting service businesses. Hylant is an insurance agency and a competitor of Appellant Acordia. It has grown substantially by acquisition of other agencies. The issues presented in this case are of critical importance to Hylant because they, like insurance agencies throughout Ohio, rely on restrictive covenants to protect their investment in their employees and customers.

STATEMENT OF FACTS

Amici curiae adopt by reference the Statement of Facts set forth in the Merit Brief of Appellant.

ARGUMENT

Proposition of Law: Pursuant to Ohio's merger statutes, agreements between employees and employers that contain restrictive covenants are assets of the constituent company that transfer automatically by operation of law in a statutory merger from the constituent company to the surviving company and are enforceable by the surviving company according to the agreements' original terms as if the surviving company were a party to the original agreements.

A. Under well-established Ohio corporate law, a constituent corporation's contracts survive a merger by operation of law as assets, rights, and/or obligations and may be enforced by the surviving corporation.

Under the authority granted it by article XIII, Section 2 of Ohio's 1851 Constitution, the General Assembly has carefully crafted the legal framework for corporate mergers in Ohio. R.C. §§1701.78, *et seq*. Central to that framework is the principle that a merger or consolidation of two corporations vests in the surviving corporation *all* of the property, including all rights and obligations, of the constituent corporations "without further act or deed." That principle dates back to the very beginning of Ohio's corporate code.

Prior to 1852, Ohio did not have a general corporation law; corporations were chartered by individual acts of the legislature. Ohio Constitution (1803) Article VIII, § 27 ("every association of persons, when regularly formed, within this State, and having given themselves a name, may on application to the Legislature, be entitled to receive letters of incorporation"). That approach was common throughout the country in the first half of the Nineteenth Century. Henn & Alexander, *Law of Corporations* (1983), 24-25. But the approach changed by 1850. "Corruption and bribery of the state legislators and the inefficiency of the system, coupled with the impact of the Industrial Revolution, called for a change." *Id.* at 25. Starting with the New York Constitution of 1846, states adopted constitutional provisions requiring incorporation under general laws, rather than specific legislative act. *See Liggett Co. v. Lee*, 288 U.S. 517, 548-567 (1933) (Brandeis, J., dissenting) (discussing history of American corporate law).

Ohio followed New York five years later when it adopted its new Constitution. Passed by statewide referendum on June 17, 1851 and taking effect September 1, the Constitution specifically outlawed the prior practice of legislatively-enacted corporate charters. Ohio Constitution (1851), Article XIII, § 1 ("The General Assembly shall pass no special act conferring corporate powers"). Article XIII, § 2 then authorized the General Assembly to enact a general corporate code. The General Assembly did just that. On May 1, 1852, it adopted "An Act to Provide for the Creation and Regulation of Incorporated Companies in the State of Ohio." 50 v. 274; S.C. 271. Section 23 of that Act spelled out what was to happen when two or more corporations consolidated:

> All and singular the rights and franchises of each and all of said two or more corporations, parties to such agreement, ... shall be deemed to be transferred to and vested in such new corporation, without any other deed or transfer; and such new corporation shall hold and enjoy the same, together with the right of way, and all other rights of property, in the same manner, and to the same extent, as if the said two or more corporations, parties to such agreement, should have continued to retain the title, and transact the business of such corporations.

Through more than a century and a half of the General Assembly's further development of Ohio corporate law, the fundamental principle of section 23 remains intact. Today's version is found at R.C. §1701.82(A). It gives the consolidated company "all assets," "rights," and "all obligations" of the constituent entities without further action. It does not distinguish between a corporation's assets or rights and its obligations, between obligations owed to the corporation and those owed by it, nor between the type of asset, right, or obligation involved.[1]

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[1] R.C. §1701.82(A) provides in pertinent part:

> (3) The surviving or new entity possesses all assets and property of every description, ... and the rights, privileges, immunities, powers, franchises, and authority ... of each constituent entity, and, ... all obligations

Over this same time period, Ohio courts have consistently recognized that companies that had been merged under that statute could fully enforce contract rights of their constituent corporations. Thus, in *Marfield v. Cincinnati, Dayton & Toledo Traction Co.* (1924), 111 Ohio St. 139, 144 N.E. 689, bondholders of a constituent corporation sought to hold the stockholders of the merged corporation personally liable for the corporation's debt, contrary to a contractual limitation of liability included in the original bonds. The theory was that the limitation was in a contract with a company that had ceased to exist upon the merger. As formulated by this Court, the question was:

> whether the Cincinnati, Dayton & Toledo Traction Company is to be viewed, for the purposes of this inquiry, as a new corporation and in the light of a purchasing corporation, or whether it is to be viewed as a merger of the two constituent companies, and therefore standing in the same relation to the bondholders as the constituent companies had theretofore stood.
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> *Marfield*, 111 Ohio St. at 154.

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belonging to or due to each constituent entity, all of which are vested in the surviving or new entity without further act or deed.

(4) The surviving or new entity is liable for all the obligations of each constituent entity, including liability to dissenting shareholders.

In virtually identical words, R. C. 1705.39(A)(4), part of Ohio's new limited liability company law enacted in 1994, governs mergers or consolidations in which the surviving entity is a limited liability company:

> The surviving or new entity possesses all of the following, and all of the following are vested in the surviving or new entity without further act or deed:
>
> * * *
>
> (i) All assets and property of every description of each constituent entity and every interest in the assets and property of each constituent entity, wherever the assets, property and interests are located.
>
> (ii) The rights, privileges, immunities, powers, franchises, and authority of each constituent entity, whether of a public or private nature.
>
> (b) All obligations belonging to or due to each constituent entity.

With a substitution of the word "employees" for the word "bondholders," that description would exactly match the question to be decided in this case. And the Court's answer to the question came directly from Ohio statutory law: "the conclusion is irresistible that the consolidated company ***merely steps into the shoes of the constituent companies.***" 111 Ohio St. at 164 (emphasis added).

In *ASA Architects, Inc. v. Schlegel* (1996), 75 Ohio St.3d 666, 665 N.E.2d 1083, this Court considered the statute in the context of whether a constituent corporation's pre-merger shareholder agreement would require the surviving corporation to purchase the shares of a later departing shareholder. The Court held it did:

> A surviving corporation in a merger is liable for all obligations of a constituent corporation. Therefore, a properly executed mandatory stock purchase agreement entered into between a closely held constituent corporation and shareholders of the company is binding upon the surviving corporation in a merger unless the agreement explicitly sets forth that in the event of a merger, the obligations of the constituent corporation cease to exist.
>
> 75 Ohio St.3d 666, at paragraph 1 of the syllabus.

The Court's conclusion: a contract transfers in a merger unless there is an expressed intent in the contract not to transfer. That conclusion flows directly from the "settled law that a merger involves the absorption of one company by another, the latter retaining its own name and identity, and acquiring the assets, liabilities, franchises and powers of the former." *Id.* at 670-671, quoting *Morris v. Investment Life Ins. Co.* (1971), 27 Ohio St.2d 26, 31, 272 N.E.2d 105.

Quite plainly, this Court could have analyzed the shareholder agreement as a contract with an entity that ceased to exist upon the merger, which is what the First District did below. But that does not reflect Ohio law. Nor is there anything about a competition agreement that distinguishes it from other kinds of contracts. In fact, in the real world of financial services and insurance businesses, competition agreements are not only typical, they are among the most important contracts that such businesses have. *See infra*, at 17-19. They are expressly considered assets of the merged corporation to be separately valued by the accountants,[2] and they provide the mechanism by which that corporation can protect its goodwill.

From the employee's viewpoint, treatment of the competition agreement as an asset to be vested in the merged corporation without further act or deed, in accordance with the well-established law detailed above, works no hardship. Indeed, if a competition agreement were to be treated as the First District suggests, any merger results in windfall for the employee – one that could not have been expected nor would have been bargained for when the employee entered into the agreement with his employer. A party contracting with a corporation

> ...is in no position to complain where the law which created that corporation provides that (on the happening of certain events and without interfering with any pending legal proceedings) such corporation's obligations and liabilities shall cease to be the obligations and liabilities of such corporation and instead shall become the obligations and liabilities of a ... legal entity into which said corporation merges.
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> *State ex rel. Safeguard Ins. Co. v. Vorys* (1960), 171 Ohio St. 109, 115, 167 N.E. 2d 910.

B. The Court of Appeals' analysis is fatally flawed.

The First District held that the enforceability of these contracts depends on the continued existence of the original employer. In each instance in which the corporate employer reorganized – whether by merger or by conversion from a corporation to an LLC under Chapter

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2 See Financial Accounting Standards Board, STATEMENT OF FINANCIAL ACCOUNTING STANDARDS NO. 141, BUSINESS COMBINATIONS (June 2001) at 28 ("Examples of Intangible Assets That Meet the Criteria for Recognition Apart from Goodwill ... Noncompetition agreements").

1705[3] – the Court concluded that the employer ceased to exist and therefore the employment relationship ended and the period specified in the competition agreement started to run.

The First District opinion creates a distinction between obligations of a corporation and obligations owed to a corporation. It bases that distinction on two judicial sleights of hand, neither of which can withstand scrutiny. First, the court pulls out of context and applies incorrectly language from *Morris v. Investment Life Ins. Co.* (1971), 27 Ohio St.2d 26, 31, 272 N.E.2d 105, concerning a constituent corporation ceasing to exist as a separate business entity after a merger. *Morris* dealt with a "Reinsurance agreement" between two insurance companies and whether it effected a merger of the companies requiring pre-approval under Ohio insurance law. This Court concluded that the agreement had all the characteristics of a merger and was therefore invalid without the pre-approval. The Court described those characteristics: "It is settled law that a merger involves the absorption of one company by another, the latter retaining its own name and identity, and acquiring the assets, liabilities, franchises and powers of the former. Of necessity, the absorbed company ceases to exist as a separate business entity." *Id.*

The First District quoted correctly the second sentence of *Morris* but then applied it incorrectly when it cut out the last five critical words "as a separate business entity":

> Ohio law is clear that a merger involves the absorption of one company by another, the latter retaining its own name and identity, and acquiring the assets, liabilities, franchises and powers of the former. Of necessity, the absorbed company

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3 In 1994, the Ohio General Assembly enacted a new limited liability corporation law to provide additional options for corporate structuring in Ohio. One cannot imagine that any member of the General Assembly in passing that legislation could have imagined that a change in organization from a corporation under R.C. Chapter 1701 to a limited liability company under R.C. Chapter 1705 would have the effect of triggering the running of a covenant not to compete, yet that is exactly what the Court of Appeals here determined. *Acordia of Ohio, LLC v. Fishel*, 2010-Ohio-6235, at ¶18.

> ceases to exist as a separate business entity." [citing *Morris*] The restrictions in the noncompete agreements in this case took effect when employment was terminated for any reason. ***Because the predecessor companies ceased to exist*** [omitting "as a separate business entity"] following the respective mergers, the Fishel team's employment with those companies was necessarily terminated at the time of the applicable merger. By their own terms, the agreements' restrictions were triggered by the relevant mergers ....
>
> *Acordia of Ohio, LLC v. Fishel*, 2010-Ohio-6235, at ¶19 (emphasis added).

The court of appeals' conclusion is just plain wrong. The fact that a constituent company in a merger "ceas[es] to exist as a separate business entity," does not mean it ceases to exist. It is well-established that the absorbed company *does* continue, just not as a separate business entity. Following a merger, "the nominal existence of the several constituent companies terminated, *but their substantial existence is perpetuated* by being merged in the consolidated company." *Citizens Savings & Trust Co. v. Cincinnati & Dayton Traction Co.* (1922), 106 Ohio St. 577, 140 N.E. 380, at paragraph 9 of the syllabus (emphasis added). *Accord Marfield*, 111 Ohio St. at 143 ("the substantial existence of the constituent companies was thereby perpetuated by being merged in the consolidated company"); *cf.*, "An Act to Provide for the Creation and Regulation of Incorporated Companies in the State of Ohio." 50 v. 274; S.C. 271 (1852), §23 ("such new corporation shall hold and enjoy the same ... and all other rights of property, in the same manner, and to the same extent, as if the said two or more corporations, parties to such agreement, should have continued to retain the title, and transact the business of such corporations"). There is a huge difference between the concepts, which the First District ignores. If the merger effects a termination of the employment of the constituent company's employees, there is no way that the merged company can be said to have "stepped into the shoes" of the constituent company. *Marfield*, 111 Ohio St. at 164.

For its second sleight of hand, the court of appeals focuses on the drafting of the competition agreements between the employees and a specifically-identified employer, defined as the "company." Once the "company" changed, so the court of appeals' theory goes, the employment terminated and the covenants began to run. *Acordia of Ohio,* 2010-Ohio-6235, at ¶¶16-17. But every contract must define the parties to it, otherwise it is not binding. In *ASA Architects*, for example, the contracting party which had the obligation was likewise identified as a specific entity, defined in the agreement as the "Company." 75 Ohio St.3d. at 666. Yet, this Court rejected the argument that the shareholder agreement of the constituent corporation disappeared when that corporation and its stock ceased to exist.

The only way that a competition agreement would identify the employer by name and still survive the lower court's analysis is if it specifically referenced a successor employer after a merger. What the First District is saying is that the competition agreement will transfer to the surviving corporation after the merger only if it has specific language that contemplates transfer of the agreement in the event of a merger. But that is backwards. In *ASA Architects*, this Court found that the agreement transferred unless it provided that it would not: "a properly executed mandatory stock purchase agreement entered into between a closely held constituent corporation and shareholders of the company is binding upon the surviving corporation in a merger *unless the agreement explicitly sets forth that in the event of a merger, the obligations of the constituent corporation cease to exist.*" 75 Ohio St.3d 666, at paragraph 1 of the syllabus (emphasis added).

Corporations entering into merger agreements must be able to rely upon Ohio corporate law unless the parties have specifically agreed to something else. They should not have to assume that the parties agreed to something other than Ohio law when the agreement is silent on the subject. *Doe v. Ronan* (2010), 127 Ohio St.3d 188, 194, 937 N.E.2d 556, n.5 ("applying the principle that existing statutory provisions are incorporated into a contract is recognition of a basic legal concept of longstanding and accepted use"); *Eastern Machinery Co. v. Peck* (1954), 161 Ohio St. 1, 6-7, 117 N.E.2d 593 ("It is an elementary principle that any law relating to a contract which is in existence at the time of the execution of the contract becomes a part of such contract"); *Jacot v. Secrest* (1950), 153 Ohio St. 553, 93 N.E.2d 1, at paragraph 1 of the syllabus ("The laws which subsist at the time and place of the making of a contract and when and where it is to be performed enter into and form a part of the contract, whether such laws affect is validity, construction, discharge, or enforcement").

C. Other jurisdictions uniformly reach the same conclusion – upon consummation of a merger, contract rights arising from competition agreements pass by operation of law and are not triggered by the merger.

The First District's decision is contrary not only to settled Ohio law but to decisions of courts across the country. In jurisdiction after jurisdiction, competition agreements survive mergers and are fully enforced by the surviving corporation. 15 FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS, §7090 (2005 Supp.) ("A covenant not to compete will survive the merger and is enforceable by the surviving corporation").

Ohio's statutory approach to rights, obligations, and assets of a surviving corporation to a merger is consistent with that of corporate codes nationwide. The Model Business Corporation Act provides that "all property owned by, and every contract right possessed by, each corporation or eligible entity that merges into the survivor is vested in the survivor without reversion or impairment." Section 11.07(a)(3). That section's official commentary makes clear that arguments about termination of an employment relationship and triggering the start of the remaining of a competition time period have no place following a merger:

> In the case of a merger, the survivor and the parties that merge into the survivor become one. The survivor automatically becomes the owner of all real and personal property and becomes subject to all liabilities, actual or contingent, of each party that is merged into it.
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> 3 Model Business Corporation Act Annotated (2011), Section 11.07, Official Comment.

The Model Act's concept that constituents to a merger "become one" is consistent with this Court's teachings in *Morris, Marfield,* and *ASA Architects.*

Different courts use different metaphors, but they all go directly to the point that, contrary to the conclusion of the First District here, the corporate existence of the constituent corporation continues in the merged entity. The Supreme Court of Florida, for example, concluded that a merged corporation had full rights to enforce a noncompete agreement because the corporations "unite" into a single corporation:

> the surviving corporation in a merger assumes the right to enforce a noncompete agreement entered into with an employee of the merged corporation by operation of law, and no assignment is necessary. This is because **in a merger, the two corporations in essence unite into a single corporate existence.**
>
> *Corporate Express Office Products, Inc. v. Phillips* (Fla. 2003), 847 So.2d 406, 414 (emphasis added).

See also Proprietors of Locks & Canals on Merimac River v. Boston & Im. R.R. (Mass. 1923), 139 N.E. 839, 841 ("The object of the consolidation of two or more solvent corporations into one is not usually to wind up the business of the old corporations but to continue as a unit that which theretofore had been separate"); *Atlantic & Birmingham Ry. Co. v. Johnson* (Ga. 1907), 56 S.E. 482, 484 ("The consolidation of two or more corporations is like the uniting of two or more rivers, neither stream is annihilated, but all continue in existence. A new river is formed, but it is a river composed of the old rivers, which still exist, though in a different form" quoting and relying on *Thompson on Corporations* §8341); *Moe v. Transamerica Title Ins. Co.* (Cal. App. 1971), 98 Cal. Rptr. 547, 556-57 (merger "merely directs the blood of the old corporation into the veins of the new, the old living in the new"); *Allen v. United of Omaha Life Ins. Co.* (Tex. App. 2007), 236 S.W.3d 315, 322 ("Merger is not the corporate equivalent of natural death"); *U.S. Shoe Corp. v. Hackett* (7th Cir. 1986), 793 F.2d 161, 163 ("Corporate law does say that merged firms 'cease to exist.' *** But a merged firm 'ceases to exist' only in the sense that it has no separate existence. *** The corporation is just the legal identity of a complex set of contracts and these contracts - - directly or indirectly between people rather than legal constructs are what matters. When the firm ceases to have a separate identity, the contracts live on." (interpreting Wisconsin law)) (Easterbrook, J.).

Because a merger vests, in the surviving corporation, all the rights of the constituent corporations, courts across the country conclude that competition agreements can be enforced by the surviving entity as fully as they could have been by the constituent company. *HD Supply Facilities Maintenance, Ltd. v. Bymoen* (Nev. 2009), 210 P.3d 183, 187 ("As the majority of courts have concluded when considering this issue, in a merger, the right to enforce the restrictive covenants of a merged corporation normally vests in the surviving entity"); *Farm Credit Services of North Central Wisconsin, ACA Wysocki* (Wis. 2001), 627 N.W.2d 444, 452 n.2 (covenant not to compete could be enforced by the surviving corporation in a merger even if the original party to the contract had ceased to exist as part of the merger); *Sevier Ins. Agency, Inc. v. Willis Corroon Corp. of Birmingham* (Ala. 1998), 711 So.2d 995, 1001 (successor corporation can enforce a non-solicitation agreement entered into with a predecessor corporation; "[t]o hold otherwise would, we believe, ignore the reality that such agreements are often important assets that businesses tend to transfer during a purchase or merger"); *Alexander & Alexander, Inc. v. Koelz* (Mo.App. 1986), 722 S.W.2d 311, 313 (non-competition covenant enforceable by surviving corporation following merger; "If the rights which inure to the benefit of the surviving corporation did not include those conferred by contracts such as those involved here, the statutory scheme which allowed such mergers would be seriously disrupted"); *Equifax Services, Inc. v. Hitz* (10th Cir. 1990), 905 F.2d 1355, 1361 (applying Missouri corporate law) ("the right to enforce a covenant not to compete generally is assignable in connection with the sale of a business .... In the case of a merger, as here, the surviving corporation automatically succeeds to the rights of the merged corporations to enforce employees' covenant not to compete"); *Sager Spuck Statewide Supply Co., Inc. v. Meyer* (N.Y.App. 2000), 273 A.2d 745 ("As a result of its subsequent merger with Statewide, plaintiff succeeded to Statewide's rights under an agreement not to compete executed by Meyer in connection with the sale of his interest in Statewide").

Even where assignments of competition agreements are prohibited by state law, mergers are understood to be different. In the last few years, both the Supreme Courts of Nevada and Nebraska have recognized that difference. In Nevada, there is a "hard-and-fast distinction" between the implications of a merger and other changes in ownership; Nevada's "rule of nonassignability does not apply when a successor corporation acquires restrictive employment covenants as a result of a merger." *HD Supply*, 210 P.3d at 188. Likewise, the Nebraska Supreme Court held that an employment restrictive covenant "passes by operation of law to a successor corporation as the result of a merger, regardless of whether the agreement would otherwise be assignable." *Aon Consulting, Inc. v. Midlands Financial Benefits, Inc.* (Neb. 2008), 748 N.W.2d 626, 637 (applying Maryland law).

D. The lower court's judicially-crafted exception to the legislative scheme undermines predictability and increases transaction costs for economic activity.

The First District's opinion, if allowed to stand, will create ambiguity, uncertainty, and added burden in corporate mergers and will have a deleterious effect on the conduct of business affairs in Ohio. As the legislature has recognized by its consistent approach to the law of mergers, businesses require predictability in the legal determinations that affect their rights in order for commerce to flourish. *See Corporate Express*, 847 So.2d at 414 (requiring an ad hoc analysis of whether a particular contract would require a consensual assignment "would inject unnecessary uncertainty into corporate transaction").

Companies complying with the corporate merger statutes reasonably expect to realize the stated effect of such a merger. They expect that the obligations, rights, and assets of the constituent corporation will flow, by operation of law, to the surviving corporation. In this way, mergers offer an opportunity to fully realize a transfer of assets of one corporation to the next without any additional actions, investigations, consents, or machinations.

Under the First District's decision, those entering into merger transactions not only must comply with the statutory requirements, they must also review each contract, covenant, lease, and agreement to confirm which would survive the constituent corporation's demise in the merger and which would not. The next step would be to secure – at additional expense – consensual assignments of covenants not to compete, other personal service contracts, leases precluding assignment, and other types of contracts in order to effect a transfer in a merger.

In essence, the parties to a merger must engage in the same exercise and expense that parties to a sale of assets engage in prior to a deal, but they would still not enjoy the advantages of an asset sale. All of that defeats a principal purpose of mergers – the ease of effecting the merged result.[4] With no difference between the process and costs of a merger and a sale of assets, corporations may conclude it best to proceed by acquiring assets alone and avoiding liabilities or simply to avoid incorporation in Ohio in favor of other states where they can find predictability and fewer burdens.

The possible chilling effect of the lower court's decision applies with even greater effect in the area of covenants not to compete, covenants not to pirate, and covenants of confidentiality. Those agreements are the tools to preserve a company's goodwill, trade secrets, and proprietary information. This is particularly true when the surviving company will own the very confidential information and customer relationships that created the need for such agreements. As such, those agreements are integral to preserving the company's assets. *See Sevier Ins.*, 711 So.2d at 1001 (successor corporation can enforce a nonsolicitation agreement entered into with a predecessor corporation; "[T]o hold otherwise would, we believe, ignore the reality that such agreements are often important assets that businesses tend to transfer during a purchase or merger").

Moreover, like intellectual property rights, such agreements play an important role in advancing commerce. This Court has spoken directly to that point:

> The law upholds these agreements because they allow the parties to work together to expand output and competition. If one party can trust the other with confidential information and secrets, then both parties are better positioned to compete with the rest of the world. *** By protecting ancillary covenants not to compete ...,

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4 Significantly, different sets of rules govern mergers and the sale and assignment of assets by one corporation to another. R.C. §§1701.76-77. The distinction between mergers and asset sales is basic to corporate law and has a long-standing history in Ohio. *Toledo, Cincinnati & St. Louis Railroad Co. v. Hinsdale* (1888), 45 Ohio St. 556, 15 N.E. 665 (differentiating the transfer of a railroad's roadbed as an asset sale from a corporate consolidation of railroad companies in assessing the surviving corporation's contractual rights and obligations).

> the law 'makes it easier for people to cooperate productively in the first place.'
>
> *Land Lake Emp. Group of Akron, LLC v. Columber* (2004), 101 Ohio St.3d 242, 2004-Ohio-786, 804 N.E.2d 217 (citations omitted).

"If covenants not to compete are routinely ignored by courts, the chances for a profitable business operation in a highly competitive marketplace are immeasurably dimmed." *Globe Services, Inc. v. Palmer* (August 18, 1986), Butler App. No. CA86-02-028, unreported, 1986 Ohio App. LEXIS 7937 at *6.

In the financial services and insurance industries, competition agreements are common and among the most important contracts such businesses have. Harlan M. Blake, "Employee Agreements Not to Compete," 73 HARV. L. REV. 625, 627 (1960) ("From the point of view of the employer, postemployment restraints are regarded as perhaps the only effective method of preventing unscrupulous competitors or employees from appropriating valuable trade information and customer relationships for their own benefit"); Malsberger, 2 COVENANTS NOT TO COMPETE ix (4th ed. 2004) ("Restrictions on postemployment activities designed to protect legitimate employer interests are relevant today more than ever. In a service-driven economy, the ability of a business to protect its investment in human resources, customer relationships and confidential business information is critical to ensuring continued economic viability. In this milieu, businesses increasingly rely upon postemployment covenants not to compete to protect these investments. The growth in the use of such covenants also represents a sound response to increased levels of employee mobility, the globalization of product market, and rapid advances in technology").

In light of the need for stability in the law and the possible adverse consequences of changes by judicial fiat, if any distinction or exception is to be made to the laws, it should be done by the General Assembly. This Court should reverse the decision of the First District.

CONCLUSION

The First District's decision imposes requirements outside the language and scope of the statutory scheme and inconsistent with the logical implications of merger. This Court should remove these requirements and the confusion they create. *Amici curiae* urge this Court to confirm that, in a merger, all the rights and obligations of and due to a constituent corporation vest, without further act or deed, in the surviving corporation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing MERIT BRIEF OF *AMICI CURIAE*, OHIO CHAMBER OF COMMERCE, OHIO CHEMISTRY TECHNOLOGY COUNCIL, USI HOLDINGS CORP., USI MIDWEST, INC., WILLIS OF OHIO, INC., AND HYLANT GROUP, INC. IN SUPPORT OF APPELLANT was sent via regular U.S. mail, postage prepaid this 27th day of June 2011, to the following:

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