In the
Supreme Court of Ohio

PATTON R. CORRIGAN, Appellant, v. JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO Appellee.	:	Case No. 2014-1836 Appeal from Ohio Board of Tax Appeals BTA Case No. 2012-3244

APPELLEE TAX COMMISSIONER'S MERIT BRIEF

J. DONALD MOTTLEY (0055164)
Taft Stettinius & Hollister LLP
65 E. State Street, Suite 1000
Columbus, OH 43215
Telephone: (614) 221-2838
Facsimile: (614) 221-2007
mottley@taftlaw.com

Counsel for Appellant
Patton R. Corrigan

MICHAEL DEWINE (0009181)
Attorney General of Ohio
BARTON A. HUBBARD (0023141)*
DAVID D. EBERSOLE (0087896)
RAINA M. NAHRA (0080238)
Assistant Attorneys General
*Counsel of Record
30 East Broad Street, 25th Floor
Columbus, Ohio 43215-3428
Telephone: (614) 466-2941
Facsimile: (877) 636-8331
barton.hubbard@ohioattorneygeneral.gov
dave.ebersole@ohioattorneygeneral.gov
raina.nahra@ohioattorneygeneral.gov

Counsel for Appellee
Joseph W. Testa, Tax Commissioner of Ohio

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INTRODUCTION

In this appeal, appellant Patrick R. Corrigan, seeks a $100,000 partial refund of his 2004 Ohio income tax liability. As his sole basis for his refund claim, Mr. Corrigan alleges that Ohio's imposition of income tax violated the nexus requirements of the Due Process Clauses of the U.S. and Ohio Constitutions, and the "substantial nexus" requirement of the dormant Commerce Clause doctrine. See Mr. Corrigan's Notice of Appeal to this Court, attached as an appendix to his opening brief filed with this Court at A-1 through A-5.

Because Ohio provided substantial benefits, protections and opportunities to Mr. Corrigan through his ownership and control of Mansfield Plumbing LLC, this claim fails. A state may validly exercise its taxing power whenever it "has given anything for which it can ask return." *Couchot v. State Lottery Comm'n*, 74 Ohio St.3d 417, 421 (1996) (emphasis added) (quoting *Wisconsin v. J.C. Penny Co.*, 311 U.S. 435, 445 (1940)); *Agley v. Tracy*, 87 Ohio St.3d 265, 266 (1999). "The determination of state taxing power generally involves the flexible application of several factors, such as the state's power, dominion, or control over that which it seeks to tax; the *benefits, protections, and opportunities afforded by the state*; and the social and governmental costs incurred by the state." *Agley v. Tracy*, 87 Ohio St.3d 265, 266 (1999) (emphasis in original) (quoting *Couchot*, 74 Ohio St.3d at 422). Mr. Corrigan errs by asking this Court to ignore this controlling Ohio and United States Supreme Court precedent, as more fully explained below.

Corrigan's initial merit brief filed with this Board ("Cor. Br."), the assessment consists of tax and interest only; the Commissioner did not impose any statutory penalties for Mr. Corrigan's failure to timely pay the tax.

B. The Commissioner assessed Mr. Corrigan Ohio income tax liability for 2004 based on a 38.827% Ohio apportionment share of the $27,563,977 gain that Mr. Corrigan received and reported for federal income taxation purposes from his sale of his majority ownership (79.29%) in Mansfield Plumbing, LLC, a limited liability company treated as a "pass-through entity" for federal and Ohio income taxation.

Under the Ohio Individual Income Tax Chapter of the Revised Code, R.C. Chapter 5747, certain kinds of business entities are not themselves subjected to Ohio income taxation. Instead, those entities' income is "passed through" to the individual owners[1] of those business entities. During the 2004 taxable period, Mr. Corrigan held a controlling, majority ownership/membership interest (79.29%) in just such a "pass-through" business entity, a limited liability company by the name of Mansfield Plumbing LLC ("Mansfield Plumbing"). See, the Commissioner's auditing agent's "Audit Remarks" at 4, reproduced at St. 17. Likewise, for several prior taxable years, Mr. Corrigan held substantially the same ownership interest of approximately 80%. See the testimony of Mr. Corrigan in the BTA hearing transcript ("Tr.") at Tr. 40-41 (averring that for the two previous taxable years he held approximately an 80% ownership interest in Mansfield Plumbing, consistent with his holding of a 79.29% ownership interest in 2004).

On February 9, 2004, Mr. Corrigan and the three minority owners/members of Mansfield Plumbing sold their respective ownership/membership interests in Mansfield Plumbing to

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[1] Under R.C. Chapter 5747, owners of "pass-through entities" of various kinds are generally referred to as "investors." In turn, the term "investor," as used in R.C. 5747.33 and throughout R.C. Chapter 5747, is defined to include "a partner, member, shareholder, or investor in *** [a] *** qualified pass-through entity."

the two previous taxable years he held approximately an 80% ownership interest in Mansfield Plumbing, consistent with his holding of a 79.29% ownership interest in 2004), A. Supp. 43.

Throughout the five year duration of his controlling ownership of Mansfield Plumbing, its corporate headquarters and principal manufacturing plant were located in Perrysville, Ohio. Tr. 42 (Mr. Corrigan's testimony concerning Mansfield Plumbing's headquarters in Perrysburg, Ohio), A. Supp. 44; Tr. 20 and 35 (Mr. Corrigan's testimony explaining the consolidation of Mansfield's manufacturing operations to just the Perrysville, Ohio plant because it was a "very efficient" plant, in contrast to Mansfield's non-Ohio facilities in Texas and California, which were closed and sold), A. Supp. 38, 42.

By Mr. Corrigan's own account, he regularly attended quarterly Mansfield Plumbing, LLC meetings in Perrysville, Ohio throughout his five-year majority ownership of that business. These "management presentations" at the Perrysville, Ohio corporate headquarters of Mansfield Plumbing, LLC "were day-long affairs, sometimes a day-and-a-half." Tr. 29, A. Supp. 40. Mr. Corrigan gained important information through the review of financial information, operating procedures of the company, new products, sales, and "all other aspects of the companies [sic] that as an investor and as a *** manager/board member that was deemed important for me to know." Id. Through these meetings and his other efforts devoted to the Mansfield business (in total "easily" exceeding 100 hours each year, Tr. 22-23, A. Supp. 39), Mr. Corrigan provided the "investment help and guidance" in his control over Mansfield's business activities. Tr. 33, A. Supp. 41.

On February 9, 2004, Mr. Corrigan and the three minority owners/members of Mansfield Plumbing sold their respective ownership/membership interests in Mansfield Plumbing to Ceramicorp, Inc. See the Audit Remarks at 2; St. 15, A. Supp. 17. As the 79.29% owner of

Mansfield Plumbing, on his amended 2004 federal income tax return, Mr. Corrigan reported his gain from his sale of his ownership interest in Mansfield Plumbing by subtracting his basis in Mansfield Plumbing from his portion of the gain, resulting in a reported capital gain of $27,563,977. Audit Remarks at 5; St. 18, A. Supp. 20; Commissioner's final determination at 1, St. 1, A. Supp. 3.[1]

The Commissioner's agents audited Mr. Corrigan's 2004 Ohio income tax liability based on Mr. Corrigan's failure to report his apportioned share of the $27,563,977 gain from his sale of his ownership of Mansfield Plumbing. The audit was triggered by the Commissioner's agents' review of Mansfield Plumbing's 2004 composite Ohio income tax return filed by Mansfield Plumbing on the Commissioner's prescribed form, IT-4708.[2] See Audit Remarks at 4, St. 17, A. Supp. 19. The Commissioner's audit resulted from a comparison of Mr. Corrigan's 2004 federal income tax return with the 2004 Ohio composite return filed by Mansfield Plumbing.

The Commissioner's agents, with Mr. Corrigan's assistance in preparing his own Ohio 2004 income tax return, determined that, in determining the amount of Mr. Corrigan's non-resident credit pursuant to R.C. 5747.05(A), the $27,563,977 gain was properly apportioned to Ohio pursuant to R.C. 5747.212. See Audit Remarks at 4, St. 17, A. Supp. 19. Mr. Corrigan's

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[1] In his originally filed 2004 federal income tax return, Mr. Corrigan reported the capital gain from his sale of Mansfield to be $28,789,657, but he then filed an amended federal income tax return reducing the capital gain from $28,789,657 to $27,563,977, resulting from a restatement of the sales price he received for his ownership interest in Mansfield. See Audit Remarks at 5; St. 16, A. Supp. 18, and the Commissioner's final determination at 1, St. 1, A. Supp. 3.

[2] Pursuant to R.C. 5747.08(D)(1)(a), a pass-through entity may file a "single return on behalf of one or more of the entity's investors *** [other than investors that are C corporations subject to Ohio corporate franchise taxation under R.C. 5733.06 ***." R.C. 5747.08(D)(1)(a) then further provides that the "single return *** shall indicate the distributive share of each of those pass-through entity investors income taxable to this state in accordance with sections 5747.20 to 5747.231 of the Revised Code." This single return is commonly referred to in state tax parlance as a "composite return." Indeed, the Commissioner's prescribed form, Form IT 4708, is captioned "Composite Income Tax Return for Certain Investors in Pass-Through Entities."

return was not processed formally by the Commissioner, so that the Commissioner's agents prepared their own return, reproduced, in part, at St. 20-23 (attachment to Audit Remarks), A. Supp. 22-25.

The Ohio apportionment fraction related to Mansfield Plumbing's *Ohio* factors of payroll, property and sales vs. those same factors *everywhere*. Because Mansfield Plumbing was headquartered in Ohio, the Ohio apportionment fraction yielded an over-all weighting of 38.8287%. See St. 23 (reproduced portion of the 2004 Ohio return prepared by the Commissioner's agents), A. Supp. 25; Tr. 42 (Mr. Corrigan's testimony concerning Mansfield Plumbing's headquarters in Perrysburg, Ohio), A. Supp. 44. In other words, under the Ohio apportionment formula, $10,702,733 of the total gain of $27, 563,977 was properly attributed to Ohio (i.e., $27,563,977 x 38.8287% = $10,702,733), and the remaining amount of the gain, $16,861,843, was properly attributed elsewhere (i.e., $27,563,977 x 61.723% = $16,861,843).

Because an individual taxpayer's Ohio income tax liability is based on his federal adjusted gross income as modified by certain Ohio adjustments to income (see R.C. 5747.01(A)), the auditing agents then determined Mr. Corrigan's Ohio income tax liability for the 2004 tax year by starting with Mr. Corrigan's federal adjusted gross income as self-reported by Mr. Corrigan on his amended 2004 federal income tax return. After Ohio adjustments (not at issue here), the auditing agents then computed Mr. Corrigan's "non-resident credit" pursuant to R.C. 5747.05(A) and R.C. 5747.212.

As a result of the Commissioner's agents' audit, the Commissioner issued an assessment of $847,085.19, inclusive of interest, without the imposition of any statutory penalties for late payment. See February 6, 2009 letter from Commissioner Agent Sherry Rehbock at 3, St. 9,

A. Supp. 11, which was followed by a formal assessment in that same amount on February 18, 2009, see the Commissioner's assessment document, reproduced at St. 3, A. Supp. 5.

Following the Commissioner's issuance to Mr. Corrigan of the 2004 Ohio income tax assessment on February 18, 2009, Mr. Corrigan failed to timely file a petition for reassessment within the 60-day petition period set forth in R.C. 5747.13(B). Nor did Mr. Corrigan pay the assessment liability within that 60-day appeal period as required to perfect the petition for reassessment pursuant to R.C. 5747.13(E).

Instead, over a year later, on April 6, 2010, Mr. Corrigan filed an application for partial refund on the Commissioner's prescribed Form IT AR, in the amount of $100,000, representing the total amount that Mr. Corrigan has paid to date on his 2004 Ohio income tax assessment. St. 24 (reproduced copy of Mr. Corrigan's Application for Personal Income Tax Refund for the 2004 tax year), A. Supp. 26.

Thereafter, the Commissioner issued his final determination denying Mr. Corrigan's refund claim against his challenges to the constitutionality of the Ohio income tax laws, followed by Mr. Corrigan's appeal to the BTA. The BTA affirmed the Commissioner's final determination and Mr. Corrigan then filed his appeal to this Court.

Any further facts will be referenced directly to the evidentiary record in the Law and Argument section which follows.

ARGUMENT

<u>Proposition of Law</u>:

Ohio's levy of a fairly apportioned Ohio income tax on the financial gains earned by a nonresident majority shareholder from his closely held Ohio-headquartered corporation does not violate the "nexus" requirements of the Due Process Clauses of the U.S. and Ohio Constitutions or the nexus prong of the dormant Commerce Clause doctrine of the U.S. Constitution.

Agley v. Tracy, 87 Ohio St.3d 265, 266-67 (1999); *Couchot v. State Lottery Comm'n*, 74 Ohio St.3d 417, 421 (1996), **approved and followed.**

Mr. Corrigan bears a heavy burden to show the laws at issue violate the nexus requirements of the Due Process Clause and dormant Commerce Clause doctrine. Laws are entitled to a strong presumption of constitutionality, and the party challenging the constitutionality of a law 'bears the burden of proving that the law is unconstitutional beyond a reasonable doubt.'" *Ohio Grocers Assn. v. Levin*, 123 Ohio St.3d 303, 2009-Ohio-4872, ¶ 11 (citing *Columbia Gas Transm. Corp. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-511), ¶ 41.

Mr. Corrigan challenges the constitutionality of the General Assembly's levy of the Ohio personal income tax on Ohio's fair share of a $27,563,977 capital gain that Mr. Corrigan received from his sale of his majority interest in an Ohio-headquartered business, Mansfield Plumbing, LLC ("Mansfield"). Mr. Corrigan asserts that Ohio's income tax on the capital gain from his sale of his closely held corporation violates the "nexus" requirements of the Due Process Clauses of the federal and Ohio constitutions, and the nexus prong of the dormant Commerce Clause doctrine.

Because Ohio provided substantial benefits, protections and opportunities to Mr. Corrigan through his ownership and control of Mansfield Plumbing LLC, this claim fails.

A. Through his majority ownership of Mansfield Plumbing, LLC ("Mansfield"), Mr. Corrigan availed himself of Ohio's benefits, protections and opportunities thereby properly subjecting his financial gains from his Mansfield business to Ohio income taxation, including his capital gain from his sale of the business, as well as his proportionate share of Mansfield's annual profits.

1. *This Court's previous case law is dispositive in favor of upholding the constitutionality of the Ohio income tax law, as applied to Mr. Corrigan's capital gain from his sale of his majority interest in Mansfield Plumbing, LLC.*

Ohio has ample authority to impose an income tax on Mr. Corrigan's financial gain earned through his sale Ohio-headquartered business, Mansfield Plumbing, LLC. Under the Due Process Clauses of the federal and Ohio constitutions, "[t]he determination of state taxing power generally involves the flexible application of several factors, such as the state's power, dominion, or control over that which it seeks to tax; the *benefits, protections, and opportunities afforded by the state*; and the social and governmental costs incurred by the state." *Agley v. Tracy*, 87 Ohio St.3d 265, 266 (1999) (emphasis in original) (quoting *Couchot v. State Lottery Comm'n*, 74 Ohio St.3d 421, 422 (1996)).

When the taxing power of the state is challenged, "[t]he simple but controlling question is **whether the state has given anything for which it can ask return**." *Couchot v. State Lottery Comm'n*, 74 Ohio St.3d at 421 (emphasis added) (quoting *Wisconsin v. J.C. Penny Co.*, 311 U.S. 435, 445 (1940)). As the Supreme Court of the United States explained in *J.C. Penney*, "a state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society." 311 U.S. at 444.

Ohio's exercise of its taxing power merely 'requires some definite, link, some *minimum connection*, between a state and person, property or transaction, it seeks to tax." *Agley*, 87 Ohio St.3d at 266 (emphasis added) (citing *Miller Bros. Co. v. Maryland*, 347 U.S. 344-45 (1954)). Indeed, "[a] state may tax such part of the income of a non-resident as is fairly attributable either to property located in the state or to events or transactions which, occurring there, are subject to state regulation and which are within the protection of the state and entitled to the numerous other benefits which it confers." *Couchot*, 74 Ohio St.3d at 422 (quoting *International Harvester v. Wisconsin Dept. of Taxation*, 322 U.S. 435, 441-42 (1944)).

In the present case, the State of Ohio has provided Mr. Corrigan with benefits, protections, and opportunities through his controlling ownership of Mansfield, an Ohio-headquartered business, for which it may impose a tax on the financial gains derived therefrom. Indeed, for the purpose of determining whether Ohio may validly exercise its taxing power, the State may properly "look through" the form of the business organization (in this case, Mansfield's organization as a limited liability company) and attribute Mansfield's Ohio business activities, property and income to Mr. Corrigan directly.

This is so because, **for purposes of doing business**, Mansfield Plumbing, LLC is merely a "legal fiction," as this Court expressly held in *Agley*: "A corporation is an entity separate and apart from the individuals who compose it; it is a legal fiction for the *purpose of doing business*." *Agley*, 87 Ohio St.3d at 268 (emphasis in original)[3]. As the Supreme Court of the United States long ago explained:

[3] In its amicus brief filed in support of Mr. Corrigan, the Ohio Chamber of Commerce argues strenuously, and wrongly, that, for purposes of determining the reach of state taxing power, a corporation is an entity separate and apart from the individuals who compose it. In support of this erroneous position, the amicus relies on the foregoing sentence quote in *Agley*, but only its first clause. The amicus omits the language following the semi-colon providing that a

> Since the corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact, * * * it is clear that unlike an individual its 'presence' without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it.

International Shoe v. State of Washington, 326 U.S. 310, 316 (1945).

In *Agley*, this Court upheld Ohio's imposition of income tax on a fairly apportioned share of non-resident individual investor/owners' annual distributions of profits from their Subchapter S-electing corporations (treated as a "pass-through" or "conduit" entities for purposes of federal and Ohio income taxation). The Court held that, because the appellant's S corporations conducted business in Ohio, the requisite "minimum contacts" existed, even though the individual owners were non-residents:

> [I]t is evident that the S corporations have utilized the protections and benefits of Ohio by carrying on business here. This income was then passed through to the appellants as personal income. **Thus, the appellants, through their S corporations, have also availed themselves of Ohio's benefits, protections, and opportunities by earning income in Ohio through their respective S corporations**. We find that this provides Ohio the "minimum contacts" with the appellants to justify taxing appellants on their distributive share of income.

(Emphasis added.) *Agley*, 87 Ohio St.3d 265, 266.

In the present case, Mansfield Plumbing, LLC (a "pass-through entity" for federal and Ohio income tax purposes, see Tr. 43-44, A. Supp. 44) engaged in business in Ohio throughout the duration of Mr. Corrigan's majority ownership of that business. Indeed, Mansfield's Ohio business activities were substantial. As Mr. Corrigan testified, Mansfield's base of operations nationally was its "corporate headquarters" in Perrysville, Ohio at which it principally conducted

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corporation "is a legal fiction for the *purpose of doing business* (emphasis in original)." See the amicus brief ("Am. Br." at 3). In fact, by placing a period after the first clause of the sentence (rather than a semicolon) the amicus actually misquotes *Agley*.

its manufacturing plant operations[4]. Mansfield Plumbing's substantial connections to Ohio are manifest through its Ohio apportionment fraction, under which *Ohio* payroll, property and sales constituted 38.8287% of its total payroll, property and sales *everywhere.*

Because Mansfield's corporate headquarters and principal manufacturing facility were, at all times, located in Perrysville, Ohio, the State of Ohio provided substantial "benefits, protections, and opportunities" to that business. Thus, the appellant, Mr. Corrigan, through his Mansfield Plumbing, LLC business, has availed himself of those same benefits, protections, and opportunities.

Ohio's provision of these benefits, protections and opportunities, over several years, throughout the course of Mr. Corrigan's five years of controlling ownership of Mansfield, made Mr. Corrigan's $27,563,977 capital gain possible, as well as any annual profit distributions that Mr. Corrigan received over that time[5]. Accordingly, under *Agley*, Ohio's provision of these benefits, protections and opportunities to Mr. Corrigan's Mansfield business provides Ohio the "minimum connection" with Mr. Corrigan to justify taxing his financial gains from that business enterprise.

In his opening merit brief, Mr. Corrigan attempts to favorably distinguish the facts of this case from those at issue in *Couchot v. State Lottery Comm'n*, wherein this Court upheld Ohio's

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[4] See Mr. Corrigan's BTA hearing testimony at Tr. 42 (Mr. Corrigan's testimony regarding the Perrysville, Ohio "corporate headquarters"), A. Supp. 44; and Tr. 20 and 35 (Mr. Corrigan's testimony explaining the consolidation of Mansfield's manufacturing operations to just the Perrysville, Ohio plant because it was a "very efficient" plant, in contrast to Mansfield's non-Ohio facilities in Texas and California, which were closed and sold), A. Supp. 38, 42.

[5] According to Mr. Corrigan's testimony at the BTA hearing, neither he, as majority owner, nor any of the minority owners of Mansfield Plumbing, LLC, ever received any annual profit distributions from the business for the four or five years that they jointly owned the company. See Tr. 33, A. Supp. 41. Thus, if Mr. Corrigan were to prevail in his challenge to the constitutionality of Ohio's taxing statutes here, Ohio would receive no tax revenue at all by reason of its substantial provision of benefits, protections and opportunities to the Mansfield business.

imposition of income tax on the Ohio lottery winnings of a nonresident. See Corrigan's brief ("Corr. Br.") at 15-16, discussing *Couchot v. State Lottery Commission*, supra. Unfortunately for the merits of Mr. Corrigan's appeal, however, his attempt to favorably distinguish his facts from those in *Couchot* does not withstand analysis. Quite the opposite is true. In *Couchot*, this Court was presented with a much closer question regarding the constitutional reach of Ohio's taxing power than is presented here.

In *Couchot*, the only "benefits, protections, and opportunities" provided by Ohio to the nonresident Ohio lottery winner related directly to a single transaction or event -- his purchase of the winning lottery ticket. In that case, the nonresident actually came to Ohio and purchased the ticket, but the Court did not find the nonresident's "physical presence" necessary to sustain Ohio's imposition of the tax. Instead, the Court simply reasoned that "the income received by Couchot [the nonresident lottery winner] arose by virtue of his participation in the Ohio lottery. The Ohio lottery is an event exclusively within the power, dominion and control of Ohio." *Couchot*, 74 Ohio St. 3d at 422.

By virtue of Ohio's incurrence of social and governmental costs to implement the rules and regulations of the lottery, the Court in *Couchot* concluded that "the state of Ohio has given something for which it can ask in return." Id. at 423. On that basis, the Court sustained the constitutionality of Ohio's income tax against the nonresident's nexus challenges under the Due Process Clauses of the federal and Ohio Constitutions and the dormant Commerce Clause doctrine.

In the instant case, by stark contrast to *Couchot*, Ohio's provision of "benefits, protections and opportunities" to Mr. Corrigan, through his Mansfield Plumbing, LLC business, is far greater and more extensive than was Ohio's provision of "benefits, protections and opportunities" to the nonresident lottery winner in *Couchot*. Over the five-year duration of Mr. Corrigan's ownership, Ohio provided the Mansfield Plumbing business (corporate headquartered in Perrysville, Ohio, where it operated its principal manufacturing plant) with continuous governmental services and protections for which Ohio incurred substantial social and governmental costs. These costs were incurred by Ohio in enabling Mr. Corrigan's $27,563,977 financial gain from his sale of that business.

Mr. Corrigan would have this Court disregard the vast, continuous, and substantial connections that Ohio shared with the Mansfield business, on the asserted basis that Mr. Corrigan *himself* did not engage in the day-to-day operations of the business in Ohio, and did not own any physical property in his own name that was located in Ohio. Yet, as this Court held in *Agley*, a corporation is a legal fiction for purposes of doing business. Thus, Mr. Corrigan's argument fails under direct application of the *Agley* holding.

Further, if Mr. Corrigan were correct, this Court's upholding of the Ohio's imposition of its income tax on the Ohio lottery winnings of nonresidents could be easily circumvented, effectively immunizing such lottery winnings from Ohio income taxation. All that would be required would be for the nonresident to form a single-member limited liability corporation ("LLC") (with the nonresident as the sole member) and then to arrange for someone other than the nonresident himself to purchase the lottery tickets. Then, in the event of a winning Ohio lottery ticket, the non-resident would simply sell or dissolve the LLC, thereby reaping the Ohio lottery winnings for himself, as the sole member of the LLC.

Under Mr. Corrigan's position in the current appeal, the capital gain that the nonresident, as the sole member of the LLC, would receive from his sale of his ownership of the LLC would not be within Ohio's taxing power. Instead, the capital gain that the nonresident would enjoy on his sale of his ownership interest in the LLC, as generated through the Ohio lottery winnings, would be outside Ohio's power to tax. In Mr. Corrigan's erroneous view, by that simple means, a nonresident Ohio lottery winner would escape the Ohio income tax on the lottery winnings.

In sum, this Court should sustain the constitutionality of the Ohio income tax here on the basis of its previous decisions in *Agley* and *Couchot* and the decisions of the Supreme Court of the United States on which those decisions are based, including *J.C. Penney*; *International Harvester*; and *Miller Bros*.

2. *A uniform body of case law from other state taxing jurisdictions sustaining the constitutionality of similar income tax impositions accords with this Court's case law.*

This Court's decision in *Agley* sustaining the constitutionality of Ohio's imposition of income tax on its fair share of the financial gains earned by nonresident owner/investors of closely held "pass-through" entities mirrors a uniform body of case law in other state tax jurisdictions sustaining state income taxes on such gains. *Johnson v. Collector of Revenue*, 246 La. 540, 165 So.2d 466, 477 (1964), *on rehearing*; *Kulick v. Dept. of Revenue*, 290 Or. 507, 624 P.2d 93 (1981); *Valentino v. Franchise Tax Bd.*, 105 Cal.Rptr.2d 304, 311, fn. 11 (4th Dist. 2001); *Prince v. State Dept. of Revenue*, 55 So.3d 273 (Ct. of Civil Appeals of Alabama 2010).

The Louisiana Supreme Court's decision in *Johnson* is directly on point. In *Johnson*, the Court sustained, against constitutional "nexus" challenge, a Louisiana income tax imposed on a nonresident stockholders' gain on their liquidation sale of corporate stock in exchange for the corporation's assets, comprised of land located in Louisiana. In so holding the *Johnson* Court applied the controlling guidance of the Supreme Court of the United States in *Wisconsin v. J.C. Penney*, supra, and correctly summarized that analysis with the observation that: "[t]he simple but controlling question is whether the state has given anything for which it can ask return." *Johnson*, 165 So.2d 466, 477 (quoting *Wisconsin v. J.C. Penney*, 311 U.S. 435, 444-445).

The *Johnson* Court then found ample reasons for concluding that Louisiana had provided substantial benefits, protections and opportunities to the corporation and its nonresident stockholders, as follows:

> To apply the test, whether the state has given anything for which it can ask return, requires an examination of the facts in relation to the practical operation of the income tax statute.
>
> The corporation owned Louisiana lands, upon which oil and gas production was developed. As a result of the mineral development, the value of the land substantially increased in the hands of the corporation. If the corporation had sold or exchanged the lands to a party other than a stockholder, the corporation would have paid a Louisiana income tax on the gain arising from the increased value. *** The legislative policy is clear: The gain is to be taxed whether it arises from an arms-length sale by the corporation or from the vesting of the property in the stockholders in redemption of their stock.
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> **Clearly, such a gain from oil-producing lands in Louisiana reflects the protection and opportunities that the state has afforded**. It is true that the state opened its doors to the business of the corporation. But the privilege of doing business in Louisiana is not the important thing here. The state also did some things in reference to the property: **State laws protected the ownership, maintenance, and development of lands; the exploration and production of minerals took place under the aegis of a conservation program created by state law and administered by state personnel**; finally, the vesting of the title of these lands in the plaintiffs was accomplished under Louisiana law.
>
> *** The stockholders realized the gain when they surrendered their stock and received the property.
>
> **The taxing power exerted by the state in the present case bears a substantial fiscal relation to the protection, opportunities, and benefits provided by the state. In short, the state has given something for which it can ask a return**. We conclude that LSA-R.S. 47:159, subd. H is constitutional.

(Emphasis added.) *Johnson*, 165 So.2d at 572-574 (footnote citations omitted).

Similarly, in *Kulik*, nonresident S corporation shareholders challenged Oregon's assessment of personal income tax imposed with respect to both distributed and undistributed income from an S corporation's business in Oregon. Namely, Oregon law included S corporation income "derived from or connected with sources in this state" within the definition of "adjusted gross income of a nonresident derived from sources within this state." The nonresidents pointed out that "not they but only the corporation [] did business in Oregon," and they predicated their due process challenge on U.S. Supreme Court cases addressing the extent of personal jurisdiction a state's courts may exercise over nonresidents. But the Oregon high court rejected such contentions, relying upon *International Harvester* along with *Shaffer v. Carter* (1920), 252 U.S. 37, 49, and *International Shoe Co. v. Washington*, supra -- two cases where the Nation's high court treated the tax jurisdiction question as a different question from the personal jurisdiction question.

Although, as Oregon's high court correctly noted, "geographic boundaries define the states as political entities," such boundaries do not "keep economic assets and opportunities within the state from enriching persons outside that may fairly be expected to share the accompanying social costs." 624 P.2d at 97. This passage properly points to the different standards historically applied to tax jurisdiction: traditionally, the State can tax if it can answer "yes" to the question "whether the state has given anything for which it can ask return." *J.C. Penny*, supra, 311 U.S. at 444; accord *Couchot* and *Agley*, supra. Plainly, the beneficial owners of income generated by business conducted within the taxing jurisdiction constitutes something "for which the state may ask return." The Oregon Supreme Court, therefore, sustained the Oregon income tax imposition on the nonresident shareholders gains derived from their ownership of the S corporation stock.

Finally it should be noted that, in their opening briefs, Mr. Corrigan and the amicus do not identify *any* case law under which any court has invalidated, as a violation of the U.S. Constitution's nexus requirements, a state income tax imposed on the financial gains of nonresident owners/investors from businesses conducted within the taxing State. Instead, they cite cases that address *statutory* issues only. See, Corr. Br. at 8 (citing *Commissioner v. Dupee*, 423 Mass. 617, 670 N.E.2d 173 (1996); and *In the Matter of the Petition of Baum, Boegner and Townsend*, DTA No. 820837 and 82838 (New York Division of Tax Appeals, Feb. 12, 2009)); and Am. Br. at 6 (citing *Commissioner v. Dupee*).

Far from supporting Mr. Corrigan's challenge to the constitutionality of Ohio's income tax statutes, these two cases simply held that, under the statutory language at issue in those cases, the imposition of the income tax was invalid. In neither *Baum* nor *Dupee* did the court address, in any way, the constitutionality of the tax statutes at issue therein, even in dicta. See, *Dupee*, 423 Mass. at 619 ("[a]t issue in this case is the proper construction of [the Massachusetts law] we have emphasized above[.]" Thus, neither of those cases provides any authority to counter the uniform body of relevant case law of this Court, the Supreme Court of the United States, and the Courts of Ohio's sister states discussed above.

3. *Ohio easily satisfies the dormant Commerce Clause standard for tax nexus, because, like the Due Process standard, it applies to the businesses' activities, not the owners' activities.*

As this Court similarly held in *Agley*, the "substantial nexus" prong of the dormant Commerce Clause doctrine is met by virtue of Ohio's provision of "benefits, protections, and opportunities" to Mr. Corrigan by his earning of income through the activities conducted and property held by his Mansfield business in Ohio. 87 Ohio St.3d at 266, 267. Like the Due Process standard for tax nexus, the dormant Commerce Clause standard is easily met here through the vast, continuous, and substantial connections that Ohio shared with Mr. Corrigan's Mansfield business.

In his opening brief, Mr. Corrigan does not attempt to suggest that, as applied to the Ohio income tax at issue here, the dormant Commerce Clause "substantial nexus" standard provides an independent basis from the Due Process nexus standard for declaring Ohio's income tax laws to be unconstitutional, and for good reason. In this regard, Mr. Corrigan does not even cite *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), and, thus, appears to tacitly concede that *Quill* does not provide any independent grounds on which he could prevail on his tax nexus challenge. In *Quill*, the Supreme Court of the United States applied a "physical presence" nexus requirement as a necessary condition for a State to impose a sales tax collection responsibility on an out-of-state seller that employed no agents or employees in the taxing state, nor held any property in that state. In an abundance of caution, however, this brief addresses *Quill* in any event.

As indicated by Mr. Corrigan's failure to even mention *Quill* in his opening brief, that case provides no help to him here, for two fundamental reasons. *First*, as this Court held in *Couchot*, "the 'physical presence' requirement of *Quill* is not applicable to the case *sub judice* [i.e., as a "case involving taxation measured by income derived from the state"]." 74 Ohio St.3d at 425 (citing Hellerstein & Hellerstein, State Taxation (2 Ed.1992), S6-3 to S6-4, 1994 A. Supp. Section 6.08[1]; and *Geoffrey, Inc. v. South Carolina Tax Comm.*, 313 S.C. 15, 23, 437 S.E.2d 13, 18, fn.4 (S.Car. 1993).

The Ohio Supreme Court's holding in *Couchot* is in accord with a uniform body of state tax cases from Ohio's sister jurisdictions that have similarly limited the *Quill* physical presence standard to sales and use tax collection cases. *See Geoffrey, Inc.,* (S.Car. 1993); *Tax Commissioner of the State of West Virginia v. MBNA America Bank*, 220 W. Va. 163, 172 (2006); *Griffith v. Conagra Brands, Inc.*, 728 S.E.2d 74, 82 (W. Va. 2012) ("physical presence in this State is not a requirement concerning the validity of the two [corporate income tax] assessments"); *Capital One Bank v. Commissioner of Revenue*, 899 N.E.2d 76 (Mass. 2009); *KFC Corp. v. Iowa Dep't of Revenue*, 792 N.W.2d 308, 329-30 (Iowa 2010). Thus, there is sound policy rationale for separating the substantial nexus doctrine for purposes of sales/use tax collection from other state tax obligations imposed on businesses and individuals.

Second, even if *Quill*'s physical presence standard were applicable to the Ohio income tax, it would be easily met here. In *Quill*, the Court cited with approval to its previous decision in *Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue*, 483 U.S. 232 (1987), which likewise involved the "substantial nexus" prong of the dormant Commerce Clause doctrine. *Quill*, 504 U.S. at 314.

In *Tyler Pipe*, the Supreme Court of the United States upheld against a "substantial nexus" challenge to the constitutionality of a Washington "business and occupation" tax imposed on the gross receipts of a nonresident corporation whose only "physical presence" in the State was through the sales solicitations of an independent contractor "manufacturer's representative," who acted on behalf of the nonresident corporation in the State of Washington. 483 U.S. at 249-251. Quoting with approval from the Washington Supreme Court decision, the Court held as follows.

> **'[T]he crucial factor governing nexus is whether <u>the activities performed in this state on behalf of the taxpayer</u> are significantly associated with the taxpayer's ability to establish and maintain a market in this state for the sales.'** 105 Wash.2d, at 323, 715 P.2d, at 126. The court found this standard was satisfied because Tyler's "sales representatives perform any local activities necessary for maintenance of Tyler Pipe's market and protection of its interests...." Id., at 321, 715 P.2d, at 125. **We agree that the activities of Tyler's sales representatives adequately support the State's jurisdiction to impose its wholesale tax on Tyler.**

(Emphasis and underlining added.) *Tyler Pipe*, 483 U.S. at 250-251.

In the present case, the "activities performed in this state on behalf" of Mr. Corrigan by his Mansfield business easily satisfy the "substantial nexus" prong of the dormant Commerce Clause doctrine. Indeed, the activities conducted and property held by Mansfield in Ohio provide ample "substantial nexus" here, particularly compared with the far less substantial nexus between the taxpayer and the taxing state involved in *Tyler Pipe*.

Further, even if the activities of Mr. Corrigan's Mansfield business were somehow erroneously disregarded in contravention of the controlling Ohio and U.S. Supreme Court case law, Mr. Corrigan's *own* physical presence in Ohio on behalf of his Mansfield business would easily satisfy any "physical presence" nexus requirement, in any event. As Mr. Corrigan testified at the BTA evidentiary hearing, he regularly attended quarterly Mansfield Plumbing, LLC meetings in Perrysville, Ohio throughout his five-year majority ownership of that business.

These "management presentations" at the Perrysville, Ohio corporate headquarters of Mansfield Plumbing, LLC "were day-long affairs, sometimes a day-and-a-half." Tr. 29, A. Supp. 41. By his own account, through his attendance and participation at these quarterly meetings, Mr. Corrigan gained important information through the review of financial information, operating procedures of the company, new products, sales, and "all other aspects of the companies [sic] that as an investor and as a *** manager/board member that was deemed important for me to know." Id. Through these meetings and his other efforts devoted to the Mansfield business (in total "easily" exceeding 100 hours each year, Tr. 22-23, A. Supp. 41), Mr. Corrigan provided his "investment help and guidance" in his control over Mansfield's business activities. Tr. 33, A. Supp. 41.

In sum, for the above reasons, this Court should sustain against Mr. Corrigan's nexus challenge the constitutionality of Ohio's imposition of income tax on Mr. Corrigan's financial gains from his sale of the Mansfield business. In the following sub-sections of the Proposition of Law, this brief addresses and refutes additional arguments raised by Mr. Corrigan and his amicus, which provide no basis for this Court to depart from its prior decisions in *Agley* and *Couchot*. Indeed, when fully considered, these arguments merely further cement the constitutionality of the Ohio income tax imposed on Mr. Corrigan's financial gains from his Ohio-headquartered majority ownership of Mansfield Plumbing, LLC.

B. The "mobilia sequunter personam" doctrine is unavailing to Mr. Corrigan here.

In his opening brief, Mr. Corrigan devotes a paragraph of his Law and Argument section to a claim that the doctrine of "mobilia sequunter personam" bars Ohio from imposing income tax on its apportioned fair share of Mr. Corrigan's $27,563,977 capital gain from his sale of his Mansfield Plumbing, LLC business. See Corr. Br. at 8.

In support of this argument, Mr. Corrigan relies solely on the following language in *Blodgett v. Silverman*, 277 U.S. 1, 15 (1928): "Intangible property *may*, for purposes of taxation, if not for all others, be regarded as situated at the domicile of the owner." (Emphasis added in this brief.) As shown from the word "may" in the foregoing quote from *Blodgett*, the "mobilia sequunter personam" doctrine is merely permissive. The doctrine merely provides that a State's taxing power "may" be validly exercised through the imposition of tax on a resident or "domiciliary" of the owner of intangible property.

As this held in *Couchot*, "the mobilia sequunter personam doctrine has little overall value in determining the taxing power of a state beyond the narrow circumstances in which it has been applied. *** Accordingly, there is no need to determine the status of a lottery or lottery ticket in this regard." 74 Ohio St.3d at 420, fn. 5. Instead, as the Court in *Couchot* explained, the reach of a state's taxing power is determined by looking to the "benefits, protections, and opportunities" afforded by the State to the taxpayer. See the extensive discussion in *Couchot*, citing and discussing a substantial body of Supreme Court of the United States decisions, including *J.C. Penney*, supra; *International Harvester*, supra; and *Curry v. McCanless*, 307 U.S. 357 (1939).

Even as a matter of *property* taxation (as distinguished from the *income* tax imposition at issue here), the Supreme Court of the United States long ago expressly rejected the doctrine of mobilia sequunter personam as a "talismanic concept" that would apply in every instance to bar the exercise of state taxing power. *Mobil Oil Corp. v. Vermont*, 445 U.S. 425, 445 (1980); *Curry v. McCanless*, 307 U.S. 357, 365-66 (1939); accord *Geoffrey,* supra, 437 S.E.2d at 20 (quoting and discussing *Mobil* and *McCanless*). The Court in *Mobil* explained that, as a bar to a State's taxation of income from intangibles involving more than one State taxing jurisdiction, the doctrine simply "no longer obtains" when applied to the taxation of income from intangibles, as follows:

> Although a fictionalized situs of intangible property sometimes has been invoked to avoid multiple taxation of ownership, **there is nothing talismanic** about the concepts of "business situs" or "commercial domicile" that automatically renders those concepts applicable **when taxation of income from intangibles is at issue**. The Court has observed that the maxim *mobilia sequuntur personam,* upon which these fictions of situs are based, "states a rule without disclosing the reasons for it." ... The Court has also recognized that **"<u>the reason for a single place of taxation no longer obtains</u>" when the taxpayer's activities with respect to the intangible property involve relations with more than one jurisdiction**.... Even for property or franchise taxes, apportionment of intangible values is not unknown.... Moreover, cases upholding allocation to a single situs for property tax purposes have distinguished income tax situations where the apportionment principle prevails. (Citations omitted).

(Emphasis and underlining added.) *Mobil*, 445 U.S. at 445.

Four decades previous to *Mobil*, the Supreme Court of the United States likewise had rejected the doctrine of mobilia sequunter personam as a valid basis for barring the exercise of taxing power by any State other than the State of domicile of the owner of the intangible. Specifically, in *McCanless*, the Court upheld the constitutionality of "death taxes" imposed by both Alabama (the State of the decedent's domicile at date of death) and by Tennessee (the State of domicile of the beneficiary of the testamentary trust, whose receipt of an intangible held by the trust was subjected to tax). In upholding each State's taxing power against constitutional challenge, the Court reasoned as follows:

> Very different considerations, both theoretical and practical, apply to the taxation of intangibles, that is, rights which are not related to physical things. Such rights are but relationships between persons, natural or corporate, which the law recognizes by attaching to them certain sanctions enforceable in courts. The power of government over them and the protection which it gives them cannot be exerted through control of a physical thing. **They can be made effective only through control over and protection afforded to those persons whose relationships are the origin of the rights** .... Obviously, as sources of actual or potential wealth—which is an appropriate measure of any tax imposed on ownership or its exercise—**they cannot be dissociated from the persons from whose relationships they are derived.**(Citations omitted).

(Emphasis added.) *McCanless*, 307 U.S. at 365-366.

To summarize, in the words of the Supreme Court of the United States in *Mobil*, if it ever had, the doctrine of mobilia sequuntur personam, "no longer obtains" as a bar to State income taxation of nonresident taxpayers. Instead, it is a permissive doctrine that may allow the State of a taxpayer's domicile to impose a tax under certain circumstances. As this Court held in *Couchot* and *Agley*, the reach of Ohio's taxing power on the income of nonresident taxpayers is determined by looking to the "benefits, protections, and opportunities" afforded to the taxpayer through the activities conducted and property held by his business in Ohio. See, specifically, *Couchot*, 74 Ohio St.3d at 420, fn. 5 (citing and discussing a substantial body of Supreme Court of the United States decisions, including *J.C. Penney*, supra; *International Harvester*, supra;; and

Curry v. McCanless, 307 U.S. 357 (1939)). Accordingly, Mr. Corrigan's unsupported contentions to the contrary should be rejected by this Court.

C. For constitutional purposes, a State may validly treat a nonresident taxpayer's capital gains from his sale of stock the same as the non-resident's annual income distributions from the business.

In his opening merit brief, Mr. Corrigan argues that this Court's decision in *Agley* upholding the constitutionality of Ohio's imposition of income tax on a nonresident's annual income distributions from his S corporation may be distinguished from this case because, in the present case, Ohio has imposed income tax on the capital gain that Mr. Corrigan earned from his sale of his ownership in the Mansfield business. See Corr. Br. at 7-8.

In support of his distinction, however, Mr. Corrigan fails to cite a single case that applies a constitutional standard for a nonresident's "capital gain" income generated by the sale of his business interest that differs from the constitutional standard applicable to a nonresident's receipt of dividends or other income distributions during his ownership of the business. Instead, as previously noted, Mr. Corrigan relies on two decisions of other states that address *statutory* issues only, and are devoid of any discussion of any constitutional issues, even in dicta. See Section A of this Proposition of Law, supra, at 10-11 (discussing *Commissioner v. Dupee*, 423 Mass. 617, 670 N.E.2d 173 (1996); and *In the Matter of the Petition of Baum, Boegner and Townsend*, DTA No. 820837 and 82838 (New York Division of Tax Appeals, Feb. 12, 2009).

The reason why Mr. Corrigan fails to cite any apposite cases in support of this distinction is apparent from the controlling U.S. Supreme Court case law. Namely, under established Supreme Court precedent, capital gains, distributive share income, and dividend income are indistinguishable from one another for constitutional purposes. *Allied-Signal*, 504 U.S. 768, 780 (1992); and *ASARCO v. Idaho Tax Comm'n*, 458 U.S. 307, 330 (1982). In *Allied Signal*, the

Court held as follows: "we have held that for constitutional purposes capital gains should be treated as no different from dividends." 504 U.S. at 772, (1992). In turn, the Court in *ASARCO* held as follows:

> In addition to the disputed dividend income, Idaho also has sought to tax certain ASARCO interest and capital gains income. * * * Idaho and ASARCO agree that interest and capital gains income derived from these companies should be treated in the same manner as the dividend income. Cf. 99 Idaho, at 937, 592 P.2d, at 52 ("In our view the same standard applies to the question whether gains from the sale of stock are business income as applies to the question whether dividends from the stock are business income"). We also agree. **"One must look principally at the underlying activity, not at the form of investment, to determine the propriety of apportionability**.

ASARCO, citing *Mobil*, 445 U.S., at 440.

Moreover, Mr. Corrigan's contention is purely a "form over substance" argument. In the present case, Mr. Corrigan and the three minority owners/members of Mansfield Plumbing, LLC sold their ownership interests to Ceramicorp, Inc., which generated a $27,563,977 capital gain for Mr. Corrigan. See the Commissioner's Audit Remarks at 2; St. 15, A. Supp. 18. Had Mr. Corrigan, instead, achieved the exact same economic result by arranging for Mansfield Plumbing, LLC to have: (1) sold the assets and liabilities of the business to Ceramicorp, Inc. and then (2) liquidated his ownership interest in Mansfield Plumbing, LLC through dissolving the business, the capital gains would have been directly earned by Mansfield Plumbing, LLC and then would have "flowed through" to Mr. Corrigan upon his dissolution of the business.

In that economically equivalent situation, Mr. Corrigan appears to tacitly concede that Ohio's taxing power would be unrestrained by any constitutional limitation under the nexus requirements of the Due Process Clauses of the federal and Ohio Constitutions or the dormant Commerce Clause doctrine. It is axiomatic that, in determining the constitutional reach of state taxing power, an examination of the facts in relation to the "practical operation of the tax statutes" is required. *J.C. Penney*, supra, 311 U.S. at 445; *Johnson*, 165 So.2d at 572 ("[t]o apply the test, whether the state has given anything for which it can ask return, requires an examination of the facts in relation to the practical operation of the income tax statute.")

In sum, the Court should sustain the constitutionality of Ohio's imposition of tax here, consistent with an examination of the facts of this case in relation to the practical operation of the Ohio income tax statutes. As established in the U.S. Supreme Court case law, "for constitutional purposes," Ohio's imposition of income tax here validly treats a nonresident taxpayer's capital gains from his sale of stock the same as the non-resident's annual income distributions from the business.

D. The unitary business principle addresses whether, under the fair apportionment prong of the dormant Commerce Clause doctrine, a state tax fairly apportions the <u>combined</u> income of a business conducted through separate legal entities (or divisions of the same legal entity) to the taxing state based upon the collective activities of those separate legal entities (or divisions) in interstate commerce.

The unitary business principle does not concern the separate inquiry whether a taxing state has "nexus," or jurisdiction to tax under the Due Process and Commerce Clauses, in the first place.

In this case, Mr. Corrigan has limited his challenge to the constitutionality of the Ohio income tax laws to a "nexus" challenge only, asserting that Ohio's imposition of income tax on the financial gains Mr. Corrigan earned from his sale of his Mansfield business exceeded the reach of Ohio's taxing power. See Mr. Corrigan's two propositions of law and supporting arguments. Corr. Br. 7-18.[6]

[6] Mr. Corrigan asserts both a "facial challenge" and an "as applied challenge" to the constitutionality of Ohio's imposition of its income tax in this case based on the nexus requirements of the Due Process Clauses of the federal and Ohio constitutions and the "substantial nexus" prong of the dormant Commerce Clause doctrine. Corr. Br. at 6. As this Court uniformly has held, "a party raising a facial challenge must demonstrate that there is no set of circumstances in which the statute would be valid." *Groch v. Gen. Motors Corp.*, 117 Ohio

Neither in his notices of appeal to this Court or to the BTA, nor in his opening merit brief has Mr. Corrigan raised any "fair apportionment" challenge to the Commissioner's imposition of the income tax, either under the Due Process Clause or the "fair apportionment" prong of the dormant Commerce Clause doctrine. Indeed, Mr. Corrigan's opening brief references only in passing that the Ohio income tax imposed by the Commissioner in this case on Mr. Corrigan's capital gain from his sale of the Mansfield business was subject to an Ohio apportionment fraction, pursuant to R.C. 5747.212. See Corr. Br. at 1, 10-12.

Specifically, pursuant to R.C. 5747.212, the Commissioner applied a 38.8287% apportionment fraction (representing Ohio's fair share of the gain generated from the Ohio activities and property of the Mansfield business) to Mr. Corrigan's $27,563,977 capital gain, resulting in Ohio adjusted gross income of $10,702,733 (i.e., $27,563,977 x 38.8287% = $10,702,733), and the remaining amount of the gain, $16,861,843, was properly attributed elsewhere (i.e., $27,563,977 x 61.723% = $16,861,843). Corrigan's argument is telling in this regard: he argues that Corrigan and Mansfield are not "unitary" for nexus purposes, but does not challenge the apportionment formula (based solely on Mansfield's factors). Corr. Br. at 10-12.

In his opening brief, Mr. Corrigan erroneously asserts that, in order for the Commissioner to validly tax his financial gains earned through his sale of his Mansfield business under the Due Process and Commerce Clauses, he, or other businesses in which he held ownership interests, must be in a "unitary" relationship with the Mansfield business. See Corr. Br. 9-13. Unfortunately for his argument, however, the unitary business principle is wholly inapplicable here.

St.3d 192, 2008-Ohio-546, 883 N.E.2d 377, ¶ 26 (citing *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-694, ¶ 26). Thus, if Mr. Corrigan's "as applied challenge" fails, his "facial challenge" necessarily does also. Accordingly, by establishing that Mr. Corrigan's "as applied challenge" fails the Commissioner likewise defeats his facial challenge.

The unitary business principle applies when a taxing authority or taxpayer seeks to: (1) *combine* income of a business conducted through separate legal entities (or divisions of the same legal entity) based upon the collective activities of those separate legal entities (or divisions) in interstate commerce; and (2) to then apply a common "apportionment" fraction to the combined income.

As the Supreme Court of the United States explained in *Exxon Corp. v. Wisconsin Dept. of Revenue*, 447 U.S. 207, 223 (1980): The "linchpin of apportionability" for state income taxation of an interstate enterprise is the "unitary-business principle" (quoting *Mobil Oil Corp. v. Commissioner of Taxes*, 100 S.Ct. 1223, 1232 (1980). The Court in *Exxon* explained the importance and relevance of the "unitary business principle" as follows:

> If a company is a unitary business, **then a State may apply an apportionment formula to the taxpayer's total income in order to obtain a "rough approximation" of the corporate income that is "reasonably related to the activities conducted within the taxing State.**" *Moorman Mfg. Co. v. Bair*, 437 U.S., at 273, 98 S.Ct., at 2341. See also *Underwood Typewriter Co. v. Chamberlain*, 254 U.S., at 120, 41 S.Ct., at 46. In order to exclude certain income from the apportionment formula, the company must prove that "the income was earned in the course of activities unrelated to the sale of petroleum products in that State." *Mobil Oil Corp. v. Commissioner of Taxes*, supra, at 439, 100 S.Ct., at 1232. The court looks to the "underlying economic realities of a unitary business," and the income must derive from "unrelated business activity" which constitutes a "discrete business enterprise," 455 U.S., at 441, 442, 439, 100 S.Ct., at 1233, 1234, 1232.

Exxon, 447 U.S. at 223-224.

In the present case, the appellee Commissioner did *not* combine Mr. Corrigan's other sources of income with the capital gain income that Mr. Corrigan earned through his Mansfield business, and, thus, is not attempting to avail himself of the "unitary business" principle. Instead, the Commissioner treated the income Mr. Corrigan earned from his majority ownership of his Mansfield business as a "discrete business enterprise," subject to Ohio apportionment using only *the Mansfield business's* property, payroll and sales figures. The 38.8287% Ohio apportionment applied by the Commissioner to determine Ohio's "fair share" slice of Mr. Corrigan's earnings from his Mansfield business is based upon only on that discrete business enterprise's activities and property, and does not include any property, payroll, or income regarding any of the other businesses or sources of income earned by Mr. Corrigan. Only if the Commissioner (or Mr. Corrigan) had sought to combine Mr. Corrigan's financial gains from his Mansfield business with his income from other interstate businesses or sources would the "unitary business" principle come into play.

Indeed, the sole case cited by Mr. Corrigan in his brief concerning the "unitary business" principle, *MeadWestvaco Corp. ex rel. Mead Corp. v. Illinois Dept. of Revenue*, 553 U.S. 16 (2008), illustrates the application of the "unitary business" principle precisely as described above. Namely, in that case, Mead Corporation had earned a capital gain from its sale of its investment in Lexis/Nexis. In determining Mead's Illinois corporate income tax liability, the Illinois Department of Revenue *combined* the capital gain income that Mead earned from its sale of Lexis/Nexis with Mead's income from its other business operations, and then applied a common apportionment fraction to that combined income, using *Mead*'s apportionment factors.

The Illinois appellate court had determined that Lexis/Nexis and Mead were properly considered to be a "unitary business," and thus affirmed the Illinois Revenue Department's computation of the tax. On appeal, the Supreme Court of the United States undertook an extensive consideration of the "unitary business" standard and held that the Illinois appellate Court had failed to apply the proper "unitary business" standard.

Accordingly, the U.S. Supreme Court remanded the case to the Illinois courts for further consideration, in order to apply the Court's guidance. 553 U.S. at 31. In doing so, the Court addressed an argument set forth in the Multistate Tax Commission's amicus brief in support of the Illinois Department of Revenue that is highly instructive here, as follows:

> Resolving this question now probably would not spare the State a remand. The State calculated petitioner's tax liability by applying the State's tax rate to Mead's apportioned business income, which in turn was calculated by applying Mead's apportionment percentage to its apportionable business income. See App. 28; Ill. Comp. Stat., ch. 35, § 5/304(a) (West 1994). **But if a constitutionally sufficient link between the State and the value it wishes to tax is founded on the State's contacts with Lexis rather than Mead, then presumably the apportioned tax base should be determined by applying the State's four-factor apportionment formula <u>not to Mead but to Lexis</u>**. Naturally, applying the formula to Lexis rather than Mead would yield a different apportionment percentage. See Brief for Multistate Tax Commission as Amicus Curiae 18–19, and n. 9; see also Hellerstein 802–803.
>
> The Multistate Tax Commission seems to argue that the difference would not affect the result because application of the formula to Lexis would have yielded a higher apportionment percentage. See Brief for Multistate Tax Commission 18–19. Amicus argues, in other words, that petitioner has no cause to complain because it caught a break in the incorrect application of a lower apportionment percentage. Amicus' argument assumes what we are in no position to decide: that Lexis' own apportioned tax base was properly calculated. Had petitioner been on notice that Lexis, rather than Mead, would supply the relevant apportionment percentage, it might have persuaded the state courts that Lexis' apportionment percentage should have been even lower than Mead's. The State's untimely resort to an alternative ground for affirmance may have denied petitioner a fair opportunity to make that argument.

(Emphasis and underlining added.) *Meadwestvaco*, 553 U.S. 16, 31, fn. 4.

Further, the emphasized language of the above *Meadwestvaco* quote pertaining to the proceedings on remand was highly pertinent to the controversy because, in its decision below, the Illinois appellate court already had determined (and Mead had conceded) that Mead had constitutional nexus with Illinois. See, *Mead Corp. v. Dept. of Revenue*, 371 Ill.App.3d 108, 117, 861 N.E.2d 1131, 1140 (2007) ("Mead does not dispute that Lexis/Nexis had the requisite connection, or nexus, with Illinois.").

As noted, in the present case, the appellee Ohio Tax Commissioner has imposed Ohio income tax on Mr. Corrigan's capital gain from his Mansfield business based on the *Mansfield* business's three-factor apportionment. In computing Mr. Corrigan's Ohio income tax liability, the Commissioner did not combine that capital gain income with any other income and did not use any apportionment figures other than the payroll, property and sales relating discretely to the Mansfield business. In other words, Ohio applied the very approach applicable when no unitary business relationship exists between a taxpayer and its investment that the Supreme Court of the United States blesses as constitutionally valid in fn. 4 of the *Meadwestvaco*.

In sum, Mr. Corrigan's attempted use of the "unitary business" principle as a means for contending that Ohio lacks nexus to tax his capital gains from the Mansfield business based on Mansfield's own apportionment factors is unavailing.

E. The additional arguments advanced by the amicus brief either are based on issues that are not jurisdictionally before the Court or that are fundamentally flawed, or both.

1. *In this appeal, Mr. Corrigan raises no statutory challenge to R.C. 5747.212. However, if he had, the proper statutory interpretation standard would require "strict construction" against such statutory challenge because the effect of limiting the applicability of R.C. 5747.212 would be to expand the non-resident credit provided in R.C. 5747.05(A), in derogation of the rights of all other taxpayers.*

   Further, far from "stifling" Ohio investment as alleged by the amicus, R.C. 5747.212 simply provides that Ohio will receive its "fair share" slice of income earned by a nonresident generated through Ohio business activities and sources -- tax revenues that would otherwise be paid by the nonresident to his home State.

The amicus brief filed in support of Mr. Corrigan by the Ohio Chamber of Commerce ("Am. Br.") sets forth several arguments that are not properly before the Court because they were never raised by Mr. Corrigan or have been abandoned by him. *Wellington v. Mahoning Cty. Bd. of* Elections, 117 Ohio St.3d 143, 2008-Ohio-554, ¶ 53 ("In general, '[*a*]*mici curiae* are not parties to an action and may not, therefore, interject issues and claims not raised by the parties.'") (quoting *Lakewood v. State Emp. Relations Bd.*, 66 Ohio App.3d 387, 394 (1990)). For example, see the Am. Br. at 13 asserting that "[t]he Court, however, can construe the statute [R.C. 5747.212] narrowly so as to avoid the constitutional problem."

In actuality, however, Mr. Corrigan has not challenged the Ohio Tax Commissioner's interpretation of R.C. 5747.212, or any other Ohio income tax statute, in his appeal to this Court. Instead, Mr. Corrigan's challenge is to the constitutionality of Ohio's taxation of its fair share of the financial gains that he earned through his majority ownership of his Mansfield business. See his Notice of Appeal to this Court, Corr. Br. Appx. at A-1 through A-5 and his opening brief filed with this Court at 1 (Mr. Corrigan's refund claim rests entirely on his constitutional challenge to R.C. 5747.212[.]").

Accordingly, as we noted above under Section A of the Proposition of Law, as the party challenging the constitutionality of the Ohio law, Mr. Corrigan "bears the burden of proving that the law is unconstitutional beyond a reasonable doubt.'" *Ohio Grocers Assn. v. Levin*, 123 Ohio St.3d 303, 2009-Ohio-4872, ¶ 11 (citing *Columbia Gas Transm. Corp. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-511), ¶ 41.

Further, if Mr. Corrigan were to have challenged the Commissioner's statutory interpretation of the Ohio income tax statutes, his challenge would necessarily have related to the computation of the "nonresident *credit*" set forth in R.C. 5747.05(A). This is so because Ohio income taxation of nonresidents begins with the taxpayer's "federal adjusted gross income," as adjusted by certain Ohio additions and deductions, and then is subject to tax reduction via the

R.C. 5747.05(A) credit.[7]

This Court long recognized that tax credit statutes and other tax reduction statutes (such as tax deductions, exemptions, and exclusions) must be *strictly construed against the tax reduction claim.* Specifically, "in all cases where a taxpayer seeks a reduction in taxes [it is] the principle that taxation is the rule, and exemption is the exception. Since the reduction depends upon legislative grace, the statute must clearly express the exemption... and a taxpayer must show his entitlement to it." *Ares, Inc. v. Limbach* (1990), 51 Ohio St.3d 102, 104, citing *Cleveland v. Bd. of Tax Appeals* (1950), 153 Ohio St. 97, 99-100, and *Nat'l Tube Co. v. Glander* (1952), 157 Ohio St. 407, syll. para. 2. Accord, *Anderson Maltbie Partnership v. Levin*, 127 Ohio St.3d 178, 2010-Ohio-4904, ¶ 16.

The rationale for strict construction of exemptions and credits lies at the very heart of the concept of democracy based as it is on equality of treatment and the proposition that those who enjoy the privileges and benefits of society should "bear [their] proportionate share of the expense." *Youngstown Metropolitan Housing Auth. v. Evatt* 143 Ohio St. 268, 773 (1944); *Anderson Maltbie*, 2010-Ohio-4904, ¶ 16.

Finally, in support of its statutory argument, the amicus erroneously contends that the Ohio income tax law, as applied by the Commissioner in this case, would allegedly "stifle" Ohio investment, and that such stifling could not have been intended by the General Assembly. See Am. Br. at 11-13 (providing four hypothetical examples of supposed investment stifling). This

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[7] See R.C. 5747.02 (levying the income tax on taxpayer's "Ohio adjusted gross income"); R.C. 5747.01(A) (defining "Ohio adjusted gross income" as "federal adjusted gross income" as defined for federal income tax purposes and as modified by enumerated Ohio deductions and additions); R.C. 5757.05(A) (providing a non-resident credit for the amount of tax on that portion of the nonresident's Ohio adjusted gross income that is not allocable to this state pursuant to R.C. 5747.20 through 5747.23); and R.C. 5747.212 (expressly limiting the subject matter of that statute's apportionment methodology solely to the computation of the R.C. 5747.05(A) nonresident credit).

claim does not withstand analysis. The opposite is true.

The amicus fails to recognize that at least 40 other States and the District of Columbia impose similarly income taxes to Ohio's. Specifically, like Ohio, in these 41 other taxing jurisdictions, individual taxpayers are generally subjected to income taxation measured by "federal adjusted gross income," as defined for federal income tax purposes, and as adjusted by enumerated statutory deductions and additions.[8]

Like Ohio (pursuant to R.C. 5747.05(B)), in those 41 other taxing jurisdictions, the tax imposed on resident taxpayers generally is subject to reduction via a resident credit for taxes the resident has paid lawfully to other states on income derived from sources in those states.[9] Thus, if Ohio were to repeal R.C. 5747.212, the consequence of that repeal would be that the nonresident investor/owners who hold at least a 20% ownership interest in their closely held

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[8] Ala.Code 40-18-2, Ala.Code 40-18-5, Ariz.Rev.Stat.Ann. 43-1011, Ark.Code Ann. 26-51-201, Cal.Revenue and Tax Code 17041, Col.Rev.Stat.Ann. 39-22-104, Conn.Gen.Stat.Ann. 12-700, Del.Code Ann. 30-1102, D.C. Code 47-1806.03, Off.Code Geor.Ann. 48-7-20, Haw.Rev.Stat. 235-4, Idaho Code 63-3002, Ill.Ann.Stat. 30-5-201, Ind.Code 6-3-2-1, Iowa Code 422.5, Kan.Stat. 79-3220, Ky.Rev.Stat.Ann. 141.020, La.Rev.Stat.Ann. 47.31, Me.Rev.Stat.Ann. 36-5111, Md. Code Ann., Tax-Gen. 10-102, Mass.Gen.L. 62-2, Mich.Comp.Laws Ann. 206.51, Minn.Stat.Ann. 290.03, Miss.Code Ann. 27-7-5, Ann.Miss.Stat. 143.011, Mon.Code Ann. 15-30-2103, Neb.Rev.St. 77-2715, N.J.Stat.Ann. 54A:2-1, N.M.Stat.Ann. 7-2-3, N.Y. Tax Law 601, N.C.Gen.Stat.Ann. 105-153.2, N.D.Cen.Code Ann. 57-38-30.3, Okl.Stat.Ann. 2355, Or.Rev.Stat.Ann. 316.007, Penn.Stat. 7302, Gen.Laws R.I.Ann. 44-30-1, S.C.Code Ann. 12-6-510, Utah Code Ann. 59-10-104, Ver.Stat.Ann. 32-5822, Va.Code Ann. 58.1-320, W.V.Code Ann. 11-21-3, Wis.Stat.Ann. 71.02, Appx. 1-282

[9] Ala.Code 40-18-21, Ariz.Rev.Stat.An.. 43-1071, Ark.Code.Ann. 26-53-131, Cal.Revenue and Tax Code 18001, Col.Rev.Stat.Ann. 39-22-108, Conn.Gen.Stat.Ann. 12-704, Del.Code Ann. 30-1111, D.C. Code 47-1806.04, Off.Code Geor.Ann. 48-7-28, Haw.Rev.Stat. 235-55, Idaho Code 63-3029, Ill.Ann.Stat. 35-5-601(b)(3), Ind.Code 6-3-3-3, Iowa Code 422.8, Kan.Stat. 79-32,111, Ky.Rev.Stat.Ann. 141.020, La.Rev.Stat.Ann. 47.33, Me.Rev.Stat.Ann. 36-5217-A, Md. Code Ann., Tax-Gen. 10-703(a), Mass.Gen.L. 62-6(a), Mich.Comp.Laws Ann. 206.255, Minn.Stat.Ann. 290.06, Miss.Code Ann. 27-7-77, Ann.Miss.Stat. 143.081, Mon.Code Ann. 15-30-2302, Neb.Rev.St. 77-2715.07, N.J.Stat.Ann. 54A:41, N.M.Stat.Ann. 7-2-13, N.Y. Tax Law 620, N.C.Gen.Stat.Ann. 105-153.9, N.D.Cen.Code Ann. 57-38-30.3(4)(a), Okl.Stat.Ann. 2357(B)(1), Or.Rev.Stat.Ann. 316.082, Penn.Stat. 7314, Gen.Laws R.I.Ann. 44-30-18, S.C.Code Ann. 12-6-3400, Utah Code Ann. 59-10-1003, Ver.Stat.Ann. 32-5825, Va.Code Ann. 58.1-332, W.V.Code Ann. 11-21-20, Wis.Stat.Ann. 71.77, Appx. 1-282.

businesses would pay the same or similar amounts of income tax *to their home States*, rather than to Ohio.

That is, whenever the investors reside in a state that imposes an income tax (the vast majority of States), there would be little or no tax savings to the investors accomplished through the repeal of R.C. 5747.212. Instead, the result would be that the investors' home States would receive *Ohio's* fair share of the income tax revenues, by default.

2. *Through his notice of appeal and briefing filed with this Court, Mr. Corrigan has limited his challenge under the dormant Commerce Clause to a "substantial nexus challenge" only. Thus, amicus' assertion that Ohio's income tax law violates the other three prongs of the dormant Commerce Clause doctrine is not properly before this Court.*

The amicus brief cursorily asserts that Ohio's taxation in this case violates the "fair apportionment" and "discrimination against interstate commerce" prongs of the dormant Commerce Clause doctrine. See Am. Br. at 9-11 (citing to *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977)). No such challenges, however, were raised by Mr. Corrigan in his notices of appeal to the BTA or to this Court and Mr. Corrigan's own brief raises no such challenges. Accordingly, the amicus' cursory arguments on these grounds are not properly considered here and do not warrant any response as they consist solely of speculative allegations unsupported by case law or evidentiary support.

And regarding Mr. Corrigan's constitutional challenge on the basis of nexus, the amicus brief barely touches on that issue. Specifically, the amicus's "Due Process Clause" nexus and dormant Commerce Clause "substantial nexus" arguments consist of single paragraphs, with a citation only to *Daimler AG v. Bauman*, ___U.S. ___, 134 S.Ct. 746 (2014), a non-tax case involving a personal jurisdiction issue under facts diametrically opposite those here.

In *Daimler*, the Supreme Court held that the Due Process Clause did not permit the exercise of *general personal jurisdiction* over a German corporation in a tort action brought in California by Argentinian citizens based on acts committed in Argentina by the German corporation's Argentinian subsidiary, where neither the parent corporation, nor the United States subsidiary, was incorporated in California, nor did either entity have its principal place of business there. In the instant case, by stark contrast, Ohio's jurisdiction to tax is based on the vast, continuous and substantial connections that link Ohio with the capital gain income earned by Mr. Corrigan through his Mansfield business, whose principal place of business was in Perrysburg, *Ohio*.

3. *Contrary to the amicus' bare assertion, Ohio's income tax on its fair share of Mr. Corrigan's capital gain earned through his Mansfield business would not result in any double taxation of Mr. Corrigan's income because his state of residency, Connecticut, provided a non-resident credit for income taxes paid to other states from sources therein.*

By contrast to Mr. Corrigan's opening brief, which makes no factual or legal allegations concerning the operation of Connecticut income tax law, the amicus brief erroneously asserts that Connecticut's resident tax credit statute does not provide a tax credit for income taxes paid to Ohio pursuant to R.C. 5747.212. See Am. Br. at 8. This allegation fails under a plain reading of Connecticut's resident credit, C.G.S.A. Section 12-704(a)(1), and a plain reading of Connecticut's regulation regarding the credit, Reg. 12-704(a)-4(a)(3) (quoted in the amicus brief at Am. Br. 8). C.G.S.A. Section 12-704(a)(1) reads as follows:

> Any resident or part-year resident of this state shall be allowed a credit against the tax otherwise due under this chapter in the amount of any income tax imposed on such resident or party-year resident for the taxable year by another state of the United states or a political subdivision thereof or the District of Columbia *on income derived from sources therein* and which is also subject to tax under this chapter.

(Emphasis added.)

As applied to the present case, to the extent that Mr. Corrigan pays the Ohio income tax, C.G. S.A. Section 12-704(a)(1) of the Connecticut income tax statutes allows a tax credit against the Connecticut income tax otherwise due in the amount of any income taxes paid to Ohio by Mr. Corrigan on income derived from sources in Ohio. In this regard, Mr. Corrigan's capital gain income from the sale of his Mansfield business constitutes "income derived from sources therein [in Ohio]."

Similarly, Connecticut's administrative regulation, Reg. 12-704(a)-4(a)(3), confirms this conclusion, providing in pertinent part, as follows: "[T]he credit is not allowed for tax imposed by another jurisdiction upon income from intangibles, *except where such income is from property employed in a business, trade or profession carried on in the other jurisdiction*." (Emphasis added.) As applied here, the Ohio income tax imposed on the capital gain earned by Mr. Corrigan through his ownership of Mansfield Plumbing, LLC plainly qualifies for the Connecticut resident credit because the income "is from property employed in a business."

CONCLUSION

For all the above reasons, the Court should sustain the constitutionality of Ohio's income tax laws against Mr. Corrigan's nexus challenges under the Due Process Clauses of the federal and Ohio Constitutions and the dormant Commerce Clause doctrine.

Respectfully submitted,

BARTON A. HUBBARD (0023141)*
DAVID D. EBERSOLE (0087896)
RAINA M. NAHRA (0080238)
Assistant Attorneys General
*Counsel of Record
30 East Broad Street, 25th Floor
Columbus, Ohio 43215-3428
Telephone: (614) 466-2941
barton.hubbard@ohioattorneygeneral.gov
dave.ebersole@ohioattorneygeneral.gov
Counsel for Appellee

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Appellee Tax Commissioner's Merit Brief was served upon the following by U.S. regular mail on this 8th day of April, 2015:

J. DONALD MOTTLEY (0055164)
Taft Stettinius & Hollister LLP
65 E. State Street, Suite 1000
Columbus, OH 43215
Telephone: (614) 221-2838
Facsimile: (614) 221-2007
mottley@taftlaw.com

Counsel for Appellant
Patton R. Corrigan

BARTON A. HUBBARD (0023141)
Assistant Attorney General