In the Supreme Court of Ohio

Crutchfield Corp., Appellant, v. Joseph W. Testa, Tax Commissioner of Ohio, Appellee.	:	Case No. 15-0386 Appeal from the Ohio Board of Tax Appeals BTA Case Nos. 2012-926, 2012-3068; 2013-2021

SECOND MERIT BRIEF OF CRUTCHFIELD CORP.

Martin I. Eisenstein (PHV 1095-2015)
(Counsel of Record)
David W. Bertoni (PHV 2436-2015)
Matthew P. Schaefer (PHV 2399-2015)
BRANN & ISAACSON
184 Main Street
P.O. Box 3070
Lewiston, ME 04243-3070
Tel. (207) 786-3566
Fax (207) 783-9325
Email: meisenstein@brannlaw.com
mschaefer@brannlaw.com

AND

Edward J. Bernert (0025808)
BAKER HOSTETLER
Capitol Square, Suite 2100
65 East State Street
Columbus, OH 43215-4260
Tel: (614) 462-2687
Fax: (614) 462-2616
Email: ebernert@bakerlaw.com

Counsel for Appellant/Cross-Appellee,
Crutchfield Corp.

Mike DeWine (0009181)
Attorney General of Ohio
Christine T. Mesirow (0015590)
Daniel W. Fausey (0079928)
Assistant Attorneys General
Office of the Attorney General
Taxation Section, 25th Floor
Rhodes Tower
30 East Broad Street
Columbus, OH 43215
Tel. (614) 466-5967
Fax (614) 466-8226
christine.mesirow@ohioattorney
general.gov
daniel.fausey@ohioattorneygeneral.gov

Counsel for Appellee/Cross-Appellant,
Joseph W. Testa, Missioner of Ohio

TABLE OF CONTENTS

TABLE OF CONTENTS (cont'd)

Page

TABLE OF CONTENTS (cont'd)

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

TABLE OF AUTHORITIES (cont'd)

Cases **Page(s)**

TABLE OF AUTHORITIES (cont'd)

Cases **Page(s)**

Cases **Page(s)**

TABLE OF AUTHORITIES (cont'd)

Cases **Page(s)**

Constitutional Provisions

Federal Statutes

State Statutes

State Statutes **Page(s)**

Other Authorities

I. INTRODUCTION

There is no dispute that under the four-prong test of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279, 97 S.Ct. 1076, L.Ed.2d (1977), a company must have a "substantial nexus" with a state in order for the state to impose tax obligations on the company, consistent with the dormant Commerce Clause of the United States Constitution. The "substantial nexus" standard with respect to state taxes measured by gross receipts—like the Ohio Commercial Activity Tax ("CAT")—is well-established and controls the outcome of this case. In a line of decisions involving such taxes that originated over 50 years ago and culminated with *Tyler Pipe Indus., Inc. v. Washington Dep't of Revenue*, 483 U.S. 232, 107 S.Ct. 2810, 97 L.Ed.2d 199 (1987), the United States Supreme Court has made clear that:

> [*T*]*he crucial factor* governing nexus is whether *the activities performed in this state on behalf of the taxpayer* are significantly associated with the taxpayer's ability to establish and maintain a market in this state for sales.

(Internal citation omitted.) (Emphasis added.) *Tyler Pipe*, 483 U.S. at 250-251; (*see* Merit Brief of Appellant Crutchfield Corp. ("Applt. Br.") at 1-2, 26-30 (discussing the *Tyler Pipe* line of cases)).

The Supreme Court has never overruled or limited the holding of *Tyler Pipe*, and it continues to be cited and applied by courts around the country. As a result, the in-state activities standard of nexus for state gross receipts taxes leads inexorably to the conclusion that the statutory basis for the tax assessment in this case, the gross receipts, "bright-line presence" provision of the CAT statute, R.C. 5751.01(I)(3), violates the Commerce Clause. This is so because, under R.C. 5751.01(I)(3) as interpreted by the Commissioner in this case, an out-of-state company must pay the CAT based *solely* on having at least $500,000 in sales to the state, without regard to any in-state activity conducted by the company or its representatives.

The Commissioner and his supporting *amici* fail to acknowledge *Tyler Pipe's* clear Commerce Clause limitations on the State's power to impose a tax measured by gross receipts. Instead, the Commissioner argues that the gross receipts "bright-line presence" provision of the CAT statute supplants the *Tyler Pipe* standard of in-state business activities. Indeed, according to the Commissioner, the statutory gross receipts standard of $500,000 in sales to the state is merely a "proxy" for a company's presumed in-state activities, and Appellant thus has substantial nexus with Ohio by virtue of a "significant economic presence alone." (Tax Commissioner's Merit Brief ("Commissioner's Br.") at 4). The Commissioner's "significant economic presence" approach is, however, a wholly arbitrary standard, based on a level of gross receipts chosen by the General Assembly, not fixed by the Constitution or by Congress pursuant to its Commerce Clause powers. Indeed, the "significant economic presence" test advocated by the Commissioner is tantamount to the lesser "minimum contacts" standard applicable under the Due Process Clause of the U.S. Constitution, not the different, and more exacting, "substantial nexus" standard of the Commerce Clause. *See Comptroller of the Treasury of Maryland v. Wynne*, __ U.S. __, 135 S.Ct. 1787, 1798-1799, 191 L.Ed2d 813 (2015) ("the fact that a State has the jurisdictional power to impose a tax says nothing about whether that tax violates the Commerce Clause"). Although there are reasonable interpretations of the CAT statute that could avoid the many constitutional infirmities inherent in its gross receipts "bright-line presence" provision, the Commissioner refuses to address them and instead *insists* on an interpretation of the statute, R.C. 5751.01(I)(3), that renders it unconstitutional, both on its face and as-applied to Appellant.

Seeking to divert the Court from applying the in-state activities standard of *Tyler Pipe*, the Commissioner also concocts a new concept of "virtual" presence in the state, based solely on the interstate Internet marketing activities of companies like Appellant. The Commissioner's novel theories, however, have no support in either the record or in the law. All of Appellant's Internet marketing activities were conducted from locations outside of Ohio. None of Appellant's marketing efforts were targeted at Ohio consumers, and none treated the residents of Ohio any differently than consumers in any other state.

The implications of the Commissioner's theories of "Internet nexus" are staggering. Under the Commissioner's "data harvesting," "cookie nexus," "software nexus" and similar theories, Internet businesses would be subject to the taxing authority of every state and locality in the Union—and, indeed, of every country in the world—from which a consumer accesses the company's website and receives cookies and/or HTML code to allow the consumer's computer to access a website residing on servers outside of Ohio. Such a theory of borderless taxing and regulatory authority is highly debatable, to say the least, and—it must be recognized—would apply equally to Ohio companies doing business online and confronted with potential tax and regulatory obligations in other jurisdictions. Several states and dozens of localities, including many municipalities both large and small, already have taxes measured by gross receipts. Approval of the Commissioner's limitless nexus concept could quickly lead, as one of the Commissioner's supporting *amici* seeks, to many more jurisdictions following suit by requiring the payment of gross receipts taxes based solely on having a website accessible to residents of the jurisdiction, or, indeed, having nothing except a so-called "significant economic presence" there (*i.e.*, making a minimum level of sales to customers in the jurisdiction). The resulting system would entangle Internet and other interstate sellers in a "welter of complicated obligations," unduly burdening interstate commerce in clear violation of the dormant Commerce Clause. *See Quill Corp. v. North Dakota*, 504 U.S. 298, 313 n.6, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992).

Under the Commerce Clause, it is the prerogative of Congress—the body entrusted by the Framers with the regulation of interstate commerce—to strike the proper balance between the interest of states in seeking to impose tax obligations on companies doing business across state lines (and over the Internet) with the fundamental constitutional objective of a national marketplace free from unduly burdensome taxation. Indeed, federal legislation regarding the proper nexus standards to apply in the area of business activity taxes like the CAT, introduced by Ohio Representative Steve Chabot (R-OH), is currently pending before the House of Representatives. H.R. 2584, Business Activity Simplification Act of 2015 (114th Cong. 2015-2016). Any changes in the established *Tyler Pipe* standard defining the limits of state taxing authority over interstate commerce are legislative judgments to be made by Congress, not by a single state's general assembly or state tax commissioner. For example, if the test, ultimately, were to be based on sales levels, federal legislators could debate and agree to a uniform national standard—rather than leaving state and local legislative bodies to adopt independently their own differing "bright line" sales levels, each of which would be subject to Commerce Clause review.

It must also be noted that the Commissioner distorts the factual record regarding Appellant's so-called in-state "assets"—bits of computer code and digital images—an alleged "business partner" in Ohio in a last ditch effort to persuade the Court to affirm the assessments under the *Tyler Pipe* test. In this reply, Appellant sets the record straight based upon the evidence adduced below, which underscores in numerous ways that Appellant simply had no direct or indirect in-state activity necessary to satisfy *Tyler Pipe's* in-state activities standard applicable to taxes measured by gross receipts.

Finally, while making a series of novel and unsupported arguments in defense of the CAT, the Commissioner never acknowledges that the constitutionality of the CAT's gross receipts "bright-line presence" provision has been in doubt from the time of its enactment.

Indeed, the Ohio legislature specifically carved out the related section, R.C. 5751.01(H)(3), for independent constitutional review because, according to Fred Church, the chief architect of the CAT, the legislature perceived the constitutionality of the $500,000 gross receipts standard of R.C. 5757.01(I)(3) as an open question for which it did not know the answer. *See* Suppl. at 681, 683-684, 687-696. The Legislature thus viewed R.C. 5751.01(I)(3), as segregable from the remainder of the CAT statute and capable of independent evaluation and invalidation. *See also* R.C. 5751.31 (authorizing a targeted challenge to "bright line presence" standards only). A ruling by the Court that the Commissioner's assessments under R.C. 5751.01(I)(3) are invalid will not render the remainder of the CAT ineffective. R.C. 1.50 (severability of an invalid statutory provision applies where "invalidity does not affect other provisions or applications of the section or related sections which can be given effect without the invalid provision").

In Section II below, we address each of the Commissioner's arguments regarding Appellant's appeal, in the order of the Propositions of Law set forth in Appellant's principal Merit Brief. Section III addresses the Commissioner's cross-appeal, which concerns the narrow issue of jurisdiction raised in the Commissioner's previously-defeated Motion to Dismiss.

II. LAW AND ARGUMENT
REPLY IN SUPPORT OF APPELLANT'S APPEAL:

<u>Proposition of Law 1</u>: R.C. 5751.01(I)(3) is unconstitutional on its face. According to its plain terms, the gross receipts "bright-line presence" provision of R.C. 5751.01(I)(3) requires that the CAT be imposed on a company solely because the company meets a statutory threshold of $500,000 in annual gross receipts from interstate sales to Ohio consumers, irrespective of whether the company has the in-state presence required under the "substantial nexus" standard for state taxes established by the Supreme Court under the Commerce Clause. *E.g.*, *Tyler Pipe*, 483 U.S. at 250-251; *Commonwealth Edison,* 453 U.S. at 626; *Std. Pressed Steel*, 419 U.S. at 562; *Gen. Motors,* 377 U.S. at 447-448.

A. The Commissioner Mischaracterizes The Requirements Of A Facial Constitutional Challenge, All Of Which Appellant Satisfies.

The Commissioner asserts that Appellant advocates a "wholly new, unsupportable standard" for a facial constitutional challenge. (Commissioner Br. at 31). That assertion is incorrect. As demonstrated in Applt. Br. at 19-25, Appellant meets all of the requirements for a facial challenge. It is the Commissioner who fails properly to describe the basic principles applicable to a facial challenge.

To begin, the Commissioner fails to cite the most basic rule of constitutional review. As this Court has made clear, a facial challenge requires the Court to review "only the text of the statute itself" without regard to any "extrinsic facts." *Global Knowledge Training, L.L.C. v. Levin*, 127 Ohio St.3d 34, 2010-Ohio-4411, 936 N.E.2d 463, ¶¶ 17, 18 (citing *Cleveland Gear Co. v. Limbach*, 35 Ohio St.3d 229, 231, 520 N.E.2d 188 (1988)). R.C. 5751.01(I)(3), as interpreted by the Commissioner and the Board of Tax Appeals, imposes the CAT based *solely* on a company making annual sales of at least $500,000 of tangible goods.[1] Appellant contends, without reference to any outside facts, that the text of R.C. 5751.01(I)(3), so construed, violates the in-state activity requirement of "substantial nexus" established by the *Tyler Pipe* line of cases.

Ignoring the straightforward nature of this challenge, the Commissioner fixates on the "no set of circumstances" test of *United States v. Salerno,* 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987), which has been applied to certain facial challenges. The Commissioner fails to acknowledge, however, that neither the U.S. Supreme Court nor this Court has ever applied the *Salerno* test in a dormant Commerce Clause case. (Applt. Br. at 22-24).[2] Nor does the Commissioner distinguish, or otherwise offer any response to, the cases cited by Appellant in which both this Court, and the Supreme Court have declined to apply the *Salerno* standard to a

[1]As discussed in Proposition of Law 3, Section A, *infra*, it is the Commissioner who argues that the only possible interpretation of R.C. 5751.01(I)(3) is that it applies regardless of whether the company engages in any activity in Ohio.

[2]The decisions of this Court in *Wymsylo v. Bartec, Inc.*, 132 Ohio St.3d 167, 2012-Ohio-2187, 970 N.E.2d 898 and *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420 (Commissioner Br. at 28), did not involve a Commerce Clause challenge.

Commerce Clause challenge. *See Columbia Gas Transm. Corp. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-511, 882 N.E.2d 400, ¶¶ 43, 53-78 (not applying *Salerno* to a Commerce Clause claim after applying it to a Due Process claim); *Emerson Elec. Co. v. Tracy*, 90 Ohio St.3d 157, 159-160 735 N.E.2d 445 (2000) (not applying *Salerno* to a Foreign Commerce Clause claim); *Kraft Gen. Foods, Inc. v. Iowa Dept. of Revenue and Fin.*, 505 U.S. 71, 82–83, 112 S.Ct. 2365, 120 L.Ed.2d 59 (1992) (Rehnquist, J. dissenting) (arguing that the Court should have applied *Salerno* to a foreign Commerce Clause claim).

This is not to say, however, that *Salerno* is no longer good law. Rather, Appellant contends that the "no set of circumstances" test adds little to the analysis of a true facial challenge under the dormant Commerce Clause, which simply requires evaluating the plain terms of a statute— e.g., a provision making gross receipts alone the basis for CAT liability— against constitutional requirements, and also that this test is a poor fit for dormant Commerce Clause cases, in particular.[3] In a long line of cases, including most recently in *Comptroller of the*

[3]The Commissioner cites cases from other jurisdictions which cited *Salerno* in the context of Commerce Clause challenge, but they are distinguishable and only serve to make Appellant's point. *See* Commissioner Br. at 28-29. First, the Commissioner cites a series of federal court cases in which the *Salerno* standard was applied to challenges alleging that *federal* statutes were inconsistent with Congress's power under the affirmative Commerce Clause, not cases involving a challenge to a state statute under the dormant Commerce Clause. *See, e.g., United States v. Trent*, 2008 WL 2897089, at *5 (S.D. Ohio July 24, 2008) (challenge to federal sex offender registry statute); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1077-78 (D.C. Cir.2003) (challenge to federal Endangered Species Act); (federal child support recovery act); *United States v. Van Buren*, 599 F.3d 170 (2d Cir. 2010) (federal sex offender registry statue); *United States v. Sage*, 92 F.3d 101, 106 (2d Cir. 1996) (Child Support Recovery Act of 1992). Challenges to federal statutes typically involve plaintiffs who hypothesize facts, which they claim demonstrate that Congress exceeded its authority to regulate based on the Commerce Clause. Such challenges are summarily rejected under *Salerno*. *See, e.g., Sage*, 92 F.3d at 106 ("We therefore need not address Sage's claim that the Act might be invalid in one highly improbable scenario.") Dormant Commerce Clause analysis is entirely different, calling upon the court to evaluate the express requirements of a state statute against the *Complete Auto* factors to determine if the law presents a danger of unduly burdening interstate commerce. Indeed, here, there is only one factual situation at issue, and but one question: Do sales alone establish the substantial nexus required under the Commerce Clause?

Treasury of Maryland v. Wynne, 135 S.Ct. at 1801-1805 (*see* Applt. Br. at 23), the U.S. Supreme Court has never applied *Salerno* to a facial challenge brought against a state statute under the dormant Commerce Clause. This is so because *Salerno* cannot supplant the review of a statute's plain terms under *Tyler Pipe's* "substantial nexus" standard.

Indeed, the Commissioner himself is guilty of misapplying *Salerno*. In arguing that the *Salerno* standard defeats Appellant's challenge, the Commissioner asserts that the gross receipts "bright-line presence" provision of R.C. 5751.01(I)(3) can be constitutionally applied to a company having "brick and mortar retail establishments" in Ohio. (Commissioner Br. at 29-30.) This purported constitutional "application" of R.C. 5751.01(I)(3) is not properly an application of the relevant statutory provision at all. A brick-and-mortar retailer is obligated to report and pay the CAT based on multiple *other provisions* of the CAT statute, *not* as a result of the "application" of the gross receipts "bright-line presence" provision at issue here. *See, e.g.*, R.C. 5751.01(H)(1) (statutory "substantial nexus" through owning capital in the state), (H)(2) (statutory "substantial nexus" by having a certificate to do business in the state), (I)(1) (statutory

---

The remaining cases cited by the Commissioner (Commissioner Br. at 28-29) further illustrate the limitations of the *Salerno* test in dormant Commerce Clause analyses. In *Gov't Suppliers Consolidating Servs., Inc. v. Bayh*, 975 F.2d 1267 (7th Cir. 1992), the Seventh Circuit set forth the *Salerno* standard, but then proceeded to apply Commerce Clause standards to the plain terms of the statute, finding the law to be facially unconstitutional. *Id.* at 1283-85 (applying the *Complete Auto* factors and the "compensatory tax doctrine"). Likewise, the New York Court of Appeals, which cited *Salerno* in *Moran Towing Corp. v. Urbach*, 99 N.Y.2d 443, 787 N.E.2d 624, 757 N.Y.S.2d 513 (2003) and *Overstock.com, Inc. v. New York State Dept. of Taxation & Fin.*, 20 N.Y.3d 586, 987 N.E.2d 621, 965 N.Y.S.2d 61 (2013), nevertheless properly determines the constitutionality of the statute without resort to an external set of facts. *See Overstock.com, Inc.*, 20 N.Y.3d at 595 ("We are bound, and adjudicate this controversy, under the binding precedents of [the U.S. Supreme] Court, the ultimate arbiter of the meaning of the Commerce Clause."). Finally, the New Jersey Supreme Court, after noting the controversy surrounding *Salerno,* construed the state statute at issue in *Whirlpool Properties, Inc. v. Dir., Div. of Taxation,* 208 N.J. 141, 26 A.3d 446 (2011), without applying *Salerno*. *Id.* at 466-468.

"bright-line presence" through property of at least $50,000 in the state), (I)(4) (statutory "bright-line presence" by having at least 25% of all property, payroll, and receipts in the state). Appellant's challenge, by contrast, asserts that the requirement of the face of the statute that a company must pay CAT based *solely* on gross receipts from Ohio customers of at least $500,000, without regard to any in-state activities conducted on behalf of the company, violates the *Tyler Pipe* substantial nexus standard. Appellant need not go beyond the face of the statute. There is only one circumstance: sales greater than the threshold, regardless of whether there were any activities in Ohio.

The Commissioner compounds his error by failing to address the Supreme Court's most recent guidance regarding facial challenges. Last term, in *City of Los Angeles v. Patel*, __ U.S. __, 135 S.Ct. 2443, 2451, 192 L.Ed.2d 435 (2015), the Court rejected an argument similar to the one advanced by the Commissioner here:

> Moreover, the City's argument *misunderstands how courts analyze facial challenges*. Under the most exacting standard the Court has prescribed for facial challenges, a plaintiff must establish that a law is unconstitutional in all of its applications. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008). But when assessing whether a statute meets this standard, the Court has considered only applications of the statute in which it actually authorizes or prohibits conduct. * * * *The proper focus of the constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant*.

(Emphasis added.) (Citation omitted.) Hypothesizing a retailer that is obligated to pay the CAT for reasons other than its sales level cannot defeat a facial challenge to the plain terms of R.C. 5751.01(I)(3).

B. The CAT Is A Tax Measured By Gross Receipts, Not A Sales Tax And Not An Income Tax.

It is important to note from the outset that the CAT is levied on "each person * * * for the privilege of doing business in this state" and is measured by gross receipts. R.C. 5751.02(A); *Ohio Grocers Assn. v. Levin*, 123 Ohio St.3d 303, 2009-Ohio-4872, ¶¶ 43-49. The statute further makes clear that the CAT "is not a transactional tax and is not [a tax on net income] subject to Public Law No. 86-272." (Brackets added) *Id.; see* 15 U.S.C. 381 (limiting authority of states to impose corporate net income taxes in accordance with P.L. 86-272). This Court held in *Ohio Grocers* that the CAT is not a sales tax. 2009-Ohio-4872, ¶¶ 50. The testimony of the Department official responsible for advocating enactment of the CAT in 2005, Fred Church, confirmed that the CAT is neither an income tax nor a sales tax, but is a tax measured by gross receipts. Suppl. at 679-680, 683-684 (the CAT is the same as the business and occupation tax at issue in *Tyler Pipe* and does "not impos[e] a tax on net income") (brackets added)).

In the following sections, Appellant demonstrates that because the CAT is a business activity tax measured by gross receipts, the standard of substantial nexus developed by the Supreme Court in the *Tyler Pipe* line of decisions is controlling and the Commissioner's reliance on certain inapposite state income tax cases is misplaced.

C. The *Tyler Pipe*, In-State Activities Standard Of "Substantial Nexus" Renders The CAT's Gross Receipts "Bright-Line Presence" Provision Unconstitutional.

The Supreme Court's development of the in-state activities standard of substantial nexus under the Commerce Clause occurred in connection with its recurring review of the Washington Business and Occupation ("B&O") Tax.[4] In its Merit Brief, Appellant traced the development of the in-state activities requirement of substantial nexus for state taxes measured by gross receipts through a series of cases, beginning in 1956 and continuing through the U.S. Supreme Court's landmark 1987 decision in *Tyler Pipe*. The history of the Court's adoption of the in-state activities requirement is worth repeating because, despite the identical nature of the CAT and the

[4]Like the CAT, the B&O is Tax imposed on the privilege of engaging in business activities in the state measure is measured by gross receipts. *Tyler Pipe*, 483 U.S. at 234-35 (*citing* Wash.Rev.Code § 82.04.220 (1985)). *See also* Suppl. at 679-680, 683 (the CAT is the same kind of tax as the B&O Tax)).

B&O Tax, the Commissioner in his brief fails to confront the central issue: that the Supreme Court has never overruled or limited the principle set forth in *Tyler Pipe* and prior cases.

In *Field Ents., Inc. v. Washington*,, 352 U.S. 806, 77 S.Ct. 55, 1 L.Ed.2d 39 (1956) (*per curiam*), *aff'ing Field Ents. v. Washington*, 47 Wash.2d 852, 289 P.2d 1010 (1955), the Supreme Court affirmed, *per curiam*, a ruling of Washington's highest court upholding the constitutionality of the B&O Tax as applied to the gross receipts of a publisher headquartered in Illinois, but engaged in substantial business activities in Washington. *See* 47 Wash.2d at 856 (company's in-state office, managers, office employees and 175 salespeople in Washington were "decisive factors in establishing and holding the market in this state for its publications."), *aff'd* 352 U.S. 806 (citing *Norton Co. v. Dept. of Revenue of Illinois*, 340 U.S. 534, 71 Ct. 377, 95 L.Ed. 517 (1951)).

The Court next reviewed the constitutionality of the B&O Tax in *Gen. Motors Corp. v. Washington*, 377 U.S. 436, 447-448, 84 S.Ct. 1564, 12 L.Ed.2d 430 (1964), *overruled, in part, on other grounds, Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue*, 483 U.S. 232 (1987). The decision in *General Motors* is particularly significant because it formed part of the basis for *Complete Auto*'s four-pronged Commerce Clause test. *See Complete Auto*, 430 U.S at 279 and n.8. The Court in *General Motors* emphasized that for a non-domiciliary company, "we look to the taxpayer's business activities within the State" to determine the constitutionality of the tax. *General Motors*, 377 U.S. at 447-448; (Applt. Br. at 27-28).

The B&O Tax was again challenged in 1975. *Std. Pressed Steel Co. v. Washington Dept. of Revenue*, 419 U.S. 560, 95 S.Ct. 706, 42 L.Ed.2d 719 (1975). The Court found that a company based in Pennsylvania with an office in California had nexus through the in-state activities of a Washington employee whose in-state work "made possible the realization and continuance of valuable contractual relations" for the company. 419 U.S. at 562-563. The Court rejected both Due Process and Commerce Clause challenges to the tax. *Id*.

After the Supreme Court issued its opinion in *Complete Auto* confirming "substantial nexus" as a requirement for the constitutionality of all state taxes (*see* 430 U.S. at 279 and n.8), the Court decided *Dept. of Revenue v. Assn. of Washington Stevedoring Cos.*, 435 U.S. 734, 750, 98 S.Ct. 1388, 55 L.Ed.2d 682 (1978). In upholding the B&O Tax, the Court recited the four requirements for state taxes under *Complete Auto* and the cases upon which it relied, including *General Motors.* 435 U.S. at 750. Explaining how each requirement was satisfied, the Court noted the "obvious nexus between Washington and respondents; indeed, respondents conduct their entire stevedoring operations within the State." *Id.*

In 1987, the Court capped its review of the B&O Tax in *Tyler Pipe.* 432 U.S. 232. The out-of-state company challenging the tax had no presence of its own in Washington, but it engaged an independent contractor in Washington, which employed multiple salespeople who "acted daily on behalf of Tyler Pipe in calling on its customers and soliciting orders" in Washington. *Id.* at 250. Although the Commissioner tries in his brief to minimize the level of in-state presence deemed sufficient by the Supreme Court to support the gross receipts tax in *Tyler Pipe*, (*see* Commissioner Br. at 6), the Court emphasized that "[t]he activities of Tyler Pipe's agents in Washington have been substantial." 483 U.S. at 249-250. Furthermore, despite the Court's finding that the company sold a "large volume of cast iron, pressure and plastic pipe and fittings, and drainage products" in the state, 483 U.S. at 249, the Court instead focused on the company's in-state presence (not the volume of its sales) as the basis for "substantial nexus." 483 U.S. at 250-251. The Court then confirmed the standard for assessing the constitutionality of the tax:

> the *crucial factor governing nexus* is whether *the activities performed in this state on behalf of the taxpayer* are significantly associated with the taxpayer's ability to establish and maintain a market in this state for the sales.

(Emphasis added.) (Citation omitted.) *Id.*

The Commerce Clause substantial nexus requirement that a company must engage in activities in the state— directly, or by persons acting on its behalf, in order for a state to impose tax obligations on the company— remains the law of the land. The Supreme Court has never overruled *Tyler Pipe* or questioned its holding. Nor has the Court undermined the standard of substantial nexus for state gross receipts taxes in other cases. Indeed, in 1992, the Court cited *Tyler Pipe* (and *Std. Pressed Steel*) with approval in *Quill,* 504 U.S. at 313, n.7, and 314. Lower courts continue to cite and apply *Tyler Pipe. See,* Applt. Br. at 2, 30 (collecting cases); *see also Avnet, Inc. v. Washington Dep't of Revenue*, 187 Wash. App. 427, 442-443, 348 P.3d 1273 (2015) (B&O Tax) ("to establish nexus, the instate activities of an out-of-state company must be substantial") (Citation omitted)).

There is no decision, by the U.S. Supreme Court or any other court, in which a state gross receipts tax assessment has been sustained against a company that, like Appellant, engaged in no activities in a state, either directly or through a third-party. The Commissioner not only fails to point out any such case, but declines even to cite *General Motors*, *Std. Pressed Steel, Washington Stevedoring Cos.,* or *Field Enterprises*, let alone other significant decisions cited in Appellant's principal Merit Brief regarding taxes measured by gross receipts, such as *Norton Co.*, 340 U.S. 534, *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 101 S.Ct. 2946, 69 L.Ed.2d 884 (1981), and *Goldberg v. Sweet*, 488 U.S. 252, 263, 109 S.Ct. 582, 102 L.Ed.2d 607 (1989), each of which reinforces the conclusion that in-state business activity is necessary to establish the Commerce Clause substantial nexus for a gross receipts tax.

D. The Commissioner's Proposed Justifications For The Gross Receipts, "Bright-Line Presence" Provision Of The CAT Statute Must Be Rejected.

1. <u>The Commissioner Cannot Circumvent Established Limits On State Taxing Power Under The Commerce Clause By Declaring A "Substantial Economic Presence" Test That Is At Odds With *Tyler Pipe*, Or By Re-Characterizing Gross Receipts As A Purported "Proxy" For In-State Activities.</u>

Relying on the testimony of Fred Church, the Department of Taxation official responsible for advocating the adoption of the CAT statute in the General Assembly in 2005, the Commissioner asserts that the $500,000 gross receipts "bright-line presence" standard of the CAT represents a "proxy" or "measuring stick" for a taxpayer's assumed in-state activities. (Commissioner Br. at 4, 35).[5] The Commissioner further claims that there is a "growing recognition that a significant economic presence in the forum state is an indicator of substantial business activity in the state, sufficient for dormant Commerce Clause purposes." (*Id.* at 4). Not only do these self-serving claims have no support in the law, the Commissioner's definition of "economic presence" is circular and simply means that a company has crossed the $500,000 sales threshold without any activities that are "performed in this state on behalf of the taxpayer."

First, the Commissioner's theories are fundamentally at odds with *Tyler Pipe's* in-state activities standard for taxes measured by gross receipts. A company plainly can make sales to in-state customers with or without engaging in activities—directly, or through third-parties—in a state. But a company's in-state activities, not its sales, are the paramount consideration of nexus under *Tyler Pipe*. Indeed, although the Court noted that the company made substantial sales in

[5]Although the Commissioner repeatedly cites to Mr. Church's testimony as if Appellant stipulated to the statements made by Mr. Church, it is important to note that Appellant did not stipulate to the accuracy or relevance of Mr. Church's testimony, only that it could be admitted before the Board in lieu of requiring Mr. Church to testify, again, to the same matters on which he was examined, and vigorously cross-examined, in an earlier proceeding. (*See* Suppl. at 606 (stipulation regarding admissibility of Mr. Church's testimony)).

the state, 483 U.S. at 249, the Court emphasized that the in-state activities of its representatives were the "crucial factor" in determining the constitutionality of the tax. *Id.* at 250-251.

The Commissioner claims that his "proxy" theory reflects a "modern trend," but he cites not a single case in which a court, at any level, has endorsed a statutorily-prescribed threshold of gross receipts as a "proxy" for actual in-state activity. There is no such case. Indeed, none of the state corporate income tax cases cited by the Commissioner and his supporting *amici* endorse a "proxy" theory of nexus, and none of them concern a statutory nexus provision based on gross receipts. The reasons for the absence of such authority are self-evident. First, since merely making interstate sales and therefore realizing gross receipts does not alone establish state taxing authority, a state may not simply imbue the receipts with some greater significance by deeming them a "proxy" for something that may or may not exist. Actual evidence of more—namely, in-state activities by or on behalf of the out-of-state company under *Tyler Pipe*—is required. Here, Appellant has affirmatively disproved any such in-state activity.

Moreover, the $500,000 level of gross receipts that the Commissioner claims has been deemed a "proxy" or "measuring stick" for assumed in-state activities reflects nothing more than a subjective legislative decision with no indication as to how it was chosen. A different state or locality might set the threshold at a much lower level. For example, Washington recently adopted a threshold of $267,000 for imposing the B&O Tax on out-of-state wholesalers making sales into the state. *See* "New Nexus Standard for Wholesale Sales – Effective Sept. 1, 2015," http://dor.wa.gov/content/getaformorpublication/publicationbysubject/taxtopics/nexusstandards.aspx. There is nothing in the Constitution which distinguishes between gross receipts of $5,000, $500,000, or $500,000,000, for that matter, as the proper level at which a state is deemed to have established, by proxy, a Commerce Clause right to impose tax obligations on an out-of-state business. In fact, if receipts, which are the very object of all interstate commerce, can be made the basis for asserting state tax and regulatory authority, then the dormant Commerce Clause would place no limits on state tax authority at all. (Applt. Brief at 39).[6]

Nor is the judicial branch suited, either by its powers or its processes, to make quasi-legislative distinctions about what sales level causes a business to "cross the line" from constitutionally protected (according to the Commissioner, $499,999.99) to subject to the jurisdiction's tax obligations ($500,000). Indeed, if there were some constitutional "de minimis" floor, at what level would it be set and on what principled basis? Is it the same for all businesses, or does it vary according to the nature of the business?[7]

Allowing states and localities to set their own sales thresholds—and, necessarily, to adjust them as they choose—would render business planning for companies engaged in interstate commerce impossible. Although the Commissioner argues that the principal virtue of

---

[6]The Commissioner suggests that the CAT's gross receipts "bright-line presence" provision is also a proxy for the degree to which a business benefits from government services, systems and infrastructure. (*See* Commissioner Br. at 34-36). This general assertion suffers from all of the same problems that undercut the "proxy" theory of substantial nexus. Moreover, as a constitutional matter, the degree to which an out-of-state company's tax obligations correspond to government services is the subject of a different part of the *Complete Auto* test, *i.e.*, the "fair relation" test under *Complete Auto's* fourth-prong. *See Oklahoma Tax Commn. v. Jefferson Lines, Inc.*, 514 U.S. 175, 199-200, 115 S.Ct. 1331, 131 L.Ed.2d 261 (1995) ("the Commerce Clause demands a fair relation between a tax and the benefits conferred upon the taxpayer by the State"). Appellant asserts that the CAT gross receipts provision violates a different prong of *Complete Auto*, substantial nexus.

[7]It takes only a moment's reflection to recognize that the gross receipts amount is *not* a valid "proxy" for even the level of sales and marketing activity of a business, let alone for the supposed level of in-state business activity or use of the state's infrastructure, facilities, or services. A foreign boat builder that makes a single sale of over $500,000 to an Ohio customer is subject to the CAT in the same manner as an in-state landlord of multiple properties bringing in rents of over $500,000, or a mail order retailer of bumper stickers that makes 25,000 deliveries to customers making purchases of $20 each. The artificiality of the sales threshold constitutional proxy rule becomes apparent for mail order and Internet sellers who often make most of their sales during the winter holiday season. They might not know if they are subject to the CAT until the very end of the year. Even if they are, their statutory "substantial nexus" would be eliminated retroactively if consumer returns in January bring them below the $500,000 level for the previous calendar year.

the $500,000 "bright line" provision of the CAT statute is that it gives businesses "certainty," authorizing states and localities to set their own level of gross receipts for the imposition of taxes would have the opposite effect for companies doing business nationwide. The Commissioner ignores the fact that a *different threshold* could apply in *every jurisdiction* having a gross receipts tax, and that those thresholds could change at the whims of each new legislature, city council, or board of county commissioners. For these reasons, the Commerce Clause requires a national perspective, taking into account the potential burdens on the national marketplace of tax policies that may be implemented across the country, not a focus upon the requirements of a single state's law.[8] The Commissioner's "proxy" theory is a non-starter.

The Commissioner defends his imposition of the CAT on retailers engaged in no in-state activities by reciting the familiar principle that the purpose of the Commerce Clause was not to relieve businesses engaged in interstate commerce from paying their "just share of the state tax burden." (Commissioner's Brief at 33 (*citing Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254, 58 S.Ct. 546, 82 L.Ed 823 (1938))). This familiar statement is now merely a platitude, which Appellant does not dispute. But such a truism does not advance the analysis. Instead, it is a principle that the U.S. Supreme Court took into consideration when fashioning the four-part test in *Complete Auto*, not a separate rule of decision. Indeed, the Supreme Court cited the concept that interstate commerce must "pay its way" in *Quill*, only to find that the state lacked the authority to impose a use tax collection obligation on retailers with no physical presence in the state under the Commerce Clause substantial nexus requirement. *Quill*, 504 U.S. at 310 n. 5.

[8] What all of these problems highlight is precisely why the Framers assigned to Congress the responsibility for regulating interstate commerce under the Commerce Clause. Endorsement of the statutory gross receipts "bright-line presence" provision, or the Commissioner's "proxy" theory in defense of it, would obliterate the fundamental principles of the dormant Commerce Clause and allow state and local legislators and tax officials to usurp congressional authority from regulating the national marketplace. *See infra*, Sections G, H.

The glaring flaw in the "substantial economic nexus" standard more generally is that, by eliminating the in-state activities requirement, the Commissioner's theory is tantamount to the lesser "minimum contacts" analysis under the Due Process Clause. The Supreme Court has, however, made crystal clear that the substantial nexus requirement of the Commerce Clause is different from, and more exacting than, the minimum contacts analysis. *Wynne*, 135 S.Ct. at 1798 (while a State may, consistent with the Due Process Clause, have the authority to tax a particular taxpayer, imposition of the tax may nonetheless violate the Commerce Clause."); *Quill*, 504 U.S. at 305, 313 and n.7 ("a corporation may have the 'minimum contacts' with a taxing State as required by the Due Process Clause, and yet lack the 'substantial nexus' with that State as required by the Commerce Clause"). Neither the Commissioner's opposition nor the briefs of its *amici* address these different standards under the separate provisions of the Constitution, despite Appellant underscoring the differences in its brief. (Applt. Br. at 38-40), Instead, the Commissioner's sales threshold proxy rule merges inappropriately the analysis of two constitutional provisions that the Supreme Court has long separated, and, to boot, applies the incorrect standard for a Commerce Clause challenge.[9]

2. The State Corporate Income Tax Cases Relied Upon By The Commissioner Are Inapplicable And Their Reasoning Flawed.

The Commissioner rests his sales proxy constitutional presence standard on a group of state court decisions concerning corporate income taxes that, in turn, rely largely on the reasoning of the West Virginia Supreme Court in *Tax Commr. v. MBNA Am. Bank, N.A.*, 220 W.Va. 163, 640 S.E.2d 226 (2006). Because the *MBNA* decision and its progeny concern state income taxes and are therefore not subject to the *Tyler Pipe* standard, Appellant respectfully

[9]The Court in *Quill* expressly rejected the "economic presence" test as sufficient to meet the requirements of the Commerce Clause for state use taxes. *Id.* at 304, 311-312.

submits that they are inapposite and cannot serve as even persuasive authority in the gross receipts tax area.

The analysis in *MBNA* is fundamentally flawed. As the dissent in *MBNA* itself observed, "[t]here is no precedential support whatsoever for the conclusions reached by the majority decision. None. None at the state level. None at the federal level." 220 W.Va. at 174 (Benjamin, J., dissenting). Indeed, the majority opinion in *MBNA* demonstrates that the West Virginia court chose expressly to disregard existing precedents and blaze entirely new territory. The court explained that, based on the "staggering evolution in commerce from the Framers' time up through today," it elected to undertake its own "fresh application of Commerce Clause principles tempered with healthy doses of fairness and common sense." 220 W.Va. at 173. The creative license taken by West Virginia and other courts following suit in income tax cases[10] conflicts with Commerce Clause precedent, but most importantly is an undertaking that *Tyler Pipe* does not permit. The U.S. Supreme Court has already established the standard for taxes measured by gross receipts.

Moreover, as demonstrated in the Appellant's opening brief, most of the income tax cases relied upon by the Commissioner and the *amici*[11] depend upon the conclusion that the *Quill*

[10]For example, in *KFC Corp. v. Iowa Dept. of Revenue*, 792 N.W.2d 308 (Iowa 2010), the Iowa Supreme Court, in finding that the licensing of trademarks by an out-of-state business for use in the state by a related entity was sufficient to establish nexus for corporate income tax purposes, explained that it was striving "simply to do our best to predict how the Supreme Court would decide the issues presented in this case." *Id.* at 323. In this case, the proper standard of nexus for a gross receipts tax case has already been decided by the Court in *Tyler Pipe*.

[11]In *Scioto Ins. Co. v. Oklahoma Tax Comm'n*, 279 P.3d 782, 2012 OK 41(Okla. 2012), cited by the Commissioner, the Court *rejected* the application of the state's corporate income tax to an out of-state company, finding that "due process is offended by Oklahoma's attempt to tax an out of state corporation that has no contact with Oklahoma other than receiving payments from an Oklahoma taxpayer * * * who has a bona fide obligation to do so under a contract not made in Oklahoma." *Id.* at 784 (citing *Quill*). Likewise, in another case cited by Commissioner, *In re Washington Mut., Inc.*, 485 B.R. 510 (Bankr. D. Del. 2012), the court found that application of the Oregon corporate income tax to certain dividend payments, based solely on the use of

physical presence standard should not be "extended" to corporate income taxes, given that the U.S. Supreme Court has not explicitly framed a "substantial nexus" test for such taxes. As discussed *supra* in Section B, however, the CAT is not an income tax, but a tax measured by gross receipts. The mantra "no extension of *Quill*" is, therefore, irrelevant because *Tyler Pipe* reflects the controlling in-state activities standard for taxes measured by gross receipts. (*See* Applt. Br. at 35-37). As the Washington Court of Appeals recently confirmed, in order to establish substantial nexus for a tax measured by gross receipts, "*the instate activities of an out-of-state company must be substantial*" and must be "associated with the company's ability to establish and maintain the company's market within the state." (Citation omitted) *Avnet, Inc.*, 187 Wash. App. at 442-443.

For the same reasons, the Commissioner's reliance on *Couchot v. State Lottery Comm.*, 74 Ohio St.3d 417, 659 N.E.2d 1225 (1996), is misplaced. (Commissioner Br. at 47-48). *Couchot* concerned an assessment of personal income taxes, not a tax measured by gross receipts. The Court's statement, in *dicta*, that the physical presence rule of *Quill* does not extend to a state income tax has no bearing on this case. *Couchot*, 74 Ohio St.3d at 425.

We also note that most of the state corporate income tax cases relied upon by the Commissioner and the *amici* present a different factual scenario that has no relevance to this appeal or to Appellant's business. Beginning with *Geoffrey, Inc. v. South Carolina Tax Comm.*, 313 S.C. 15, 437 S.E.2d 13 (1993), state supreme courts have reviewed corporate trademark holding company structures used as a tax avoidance strategy to shift in-state income to a related entity located outside the state. *See e.g., KFC Corp.*, 792 N.W.2d at 310; *Geoffrey, Inc. v.*

---

intellectual property in the state, would have "devastating consequences to shareholders and to the United States economy" and concluded that the company receiving the dividends did not have substantial nexus with the state. *Id.* at 521.

Commissioner of Revenue, 453 Mass. 17, 899 N.E.2d 87 (2009); *A&F Trademark, Inc. v. Tolson*, 605 S.E.2d 187, 167 N.C. App. 150, 605 S.E.2d 187 (2004). In the corporate income tax cases relied upon by the Commissioner and the *amici*, licensees of the out-of-state trademark owner paid royalties for the use of the marks and displayed them on stores and signage within the state. *E.g., A&F Trademark,* 167 N.C. App. at 162; *Geoffrey,* 453 Mass. at 24.

Thus, although the out-of-state company had no physical presence of its own in the state, it earned income from the in-state use of its trademarks under a contract with a related party that not only controlled the in-state use of the marks, but also provided for payments to the company based on revenue generated by the related company's in-state sales. *See, e.g., Kmart Corp. v. New Mexico Taxation & Revenue Dept.,* 139 N.M. 177, 188, 131 P.3d 17, 2006 NMCA-026 (2002) ("As the Department argues, the record below supports a conclusion that Kmart Corporation used its stores and employees in New Mexico as local representatives of KPI's goodwill, under a licensing agreement with KPI, to promote both its own sales and the goodwill of KPI's marks."), *rev'd in part and cert. quashed in part, Kmart Corp. v. Taxation & Revenue Dept.,* 2006 NMSC-006, 139 N.M. 172, 131 P.3d 22 (2005); *see also In re Washington Mut. Corp.*, 485 B.R. at 521 ("The majority of courts to address this issue, however, have found a substantial nexus for Commerce Clause purposes only when the intangible property itself generated income for the taxpayer.").

Appellant's business is entirely different. Not only does it lack stores in the state, it has no contractual agreements with in-state sellers who engage in activities in Ohio, such as use of Appellant's trademark, to drive revenue to Appellant. Appellant thus has no similar third-party acting on its behalf in Ohio to generate income for it in this state.[12]

[12]The fact that the U.S. Supreme Court denied a petition for *certiorari* in one or more of the inapposite state income tax cases cited by the Commissioner and the *amici* is, of course, of no

E. The Commissioner's Attempt To Set-Up The Supreme Court's *Quill* Decision As A "Straw Man" Fails.

While failing even to address the application of the *Tyler Pipe* standard, the Commissioner and his *amici* mount an assault on the Supreme Court's decision in *Quill*, armed primarily with the same inapplicable state income tax cases. This quixotic endeavor is futile.

First, the significance of *Quill* to this appeal is not that it is controlling authority. Appellant has never argued that it is. Rather, the "physical presence" standard of substantial nexus reaffirmed by the Court in *Quill* parallels, but does not supplant, the *Tyler Pipe* standard of in-state activities for state taxes measured by gross receipts. As explained in Appellant's Merits Brief, the U.S. Supreme Court's gross receipts tax precedents and sales/use tax precedents inform one another with regard to the substantial nexus requirement of the Commerce Clause. For example, the Court in *Tyler Pipe* relies on two leading sales/use tax cases for its conclusion that that "the crucial factor governing nexus is whether the activities performed in this state on behalf of the taxpayer are associated with the taxpayer's ability to make and maintain a market in this state for the sales." 483 U.S. at 250 (citing, for example, *Scripto, Inc. v. Carson*, 362 U.S. 207, 80 S.Ct. 619, 4 L.Ed.2d 660 (1960), which like *Tyler Pipe* involved sales representatives operating in the state). Similarly, in *Quill*, the Court cited and relied upon four of its earlier decisions involving state taxes measured by gross receipts. *See Quill*, 504 U.S. at 311 (identifying *Goldberg* and *Commonwealth Edison* as following *National Bellas Hess, Inc. v. Illinois Dept. of Revenue*, 386 U.S. 753, 87 S.Ct. 1389, 18 L.Ed.2d 505 (1967)) and 314 (citing *Std. Pressed Steel* and *Tyler Pipe* as cases involving taxpayers who had a physical presence). In

---

import since "denial of a writ of certiorari imports no expression of opinion upon the merits of the case." *Teague v*. Lane, 489 U.S. 288, 296, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (collecting cases). While denials of *certiorari* carry no precedential weight, the Court's decisions in *Tyler Pipe* and other B & O and related gross receipts tax cases *are* controlling precedent.

short, *Quill* does not dictate the outcome in this case—*Tyler Pipe* does—though *Quill* strongly supports it.

Second, the Commerce Clause principles which informed the Supreme Court's decision in *Quill* are fully applicable here. As discussed in Section G, *infra*, there is a substantial risk that numerous other jurisdictions will adopt a gross receipts nexus standard if the CAT "bright-line presence" provision of R.C. 5751.01(I)(3), or the Commissioner's "substantial economic nexus" theory (or other novel theories), are adopted here. These expansive nexus theories create the real prospect that interstate sellers will be required to comply with gross receipts taxes in the dozens of state and local jurisdictions that already have such taxes, and the many thousands more jurisdictions that may follow suit. Internet and other interstate sellers with no connection to a jurisdiction other than customers would then be potentially required to comply with a myriad of gross receipts taxes having different and varying rates, seller classifications, exemptions, reporting obligations, filing frequencies, and record-keeping obligations. Such an expansion of state and local taxing authority would have a dramatic impact on remote sellers in every state, including Ohio.

Indeed, because gross receipts taxes fall directly on the seller and are not (like sales taxes) collected from the customer, sellers would have incentives to segregate their markets depending upon the cost of the tax and compliance burdens in various jurisdictions. Interstate commerce would be stifled and divided, resulting in the very kinds of undue burdens that the Commerce Clause is designed to prevent. *Quill*, 504 U.S. at 313 n.6.[13] Adherence to a clear

---

[13]The Commissioner's statement that "for more than 20 years state courts have sustained the validity of generally applicable privilege of doing business taxes on out-of-state retailers regardless of physical presence," (Commissioner Br. at 49), is not only inaccurate but more importantly misses the point. The U.S. Supreme Court in the *Tyler Pipe* line of cases has established an in-state business activity requirement as a limitation on state power to impose

rule, although it may appear "artificial at its edges," as the *Quill* court noted, is "more than offset by the benefits of" a rule that "firmly establishes the boundaries of legitimate state authority"—a limitation that Congress has the power and the ability to change in weighing the relative benefits and burdens. *Id*. at 315-318. The same is true with regard to business activity taxes measured by gross receipts.

F. The Commissioner's Argument That, Under *Tyler Pipe*, In-State Activities By, Or On Behalf Of, The Taxpayer Are "Sufficient But Not Necessary" For Substantial Nexus Is At Odds With The Court's Ruling In *Tyler Pipe* Itself And Other Court Decisions.

The Commissioner attempts, in passing, to minimize the in-state activities requirement of *Tyler Pipe,* but his contention fails. The Commissioner asserts that the Court in *Tyler Pipe* "held that the in-state activities of one independent contractor was *sufficient* for non-sales tax nexus, but made no assertion that a physical presence was *necessary* for non-sales tax nexus." (Emphasis sic.) (Commissioner Br. at 38) The Commissioner's "sufficient but not necessary" argument is refuted by *Tyler Pipe* itself, which found that the "crucial factor governing nexus" was the performance of in-state activities on behalf of the company that assisted it to make and maintain a market for sales in the state. 483 U.S. at 250-251.

While the language used by the Court emphasizes that the in-state activities performed by Tyler Pipe's multiple sales representatives in the state were a necessary element of substantial nexus, the circumstances of the case leave no doubt. Tyler Pipe, itself, had no direct presence in the state through offices, property or employees. As the Court noted, however, the company had a substantial market for sales of cast iron, pressure and plastic pipe and fittings, and drainage products in the state. *Id.* at 249. The Court nevertheless held that the "crucial factor" in establishing the necessary substantial nexus to sustain the constitutionality of the state's gross

---

taxes measured by gross receipts. Thus, the "settled expectations," of Internet sellers, contrary to the Commissioner's claim, have not changed.

receipts tax was the performance of substantial in-state activities on the company's behalf by representatives of the company operating *in the state*. Of course, if in-state business activities had not been required, the Court could have readily deflected the company's constitutional challenge—which was premised on a lack of sufficient presence in the state (*see id.* at 240 ("[w]e then consider Tyler's claims that its activities in the State of Washington are not sufficient to subject it to the State's taxing jurisdiction"))—by simply holding that the company's substantial sales in the state were constitutionally sufficient without regard to any in-state activities.[14] Instead, the Court focused on the in-state activities of Tyler Pipe's independent salespeople.

The Court's reliance in *Tyler Pipe* on in-state activities is consistent with the series of earlier cases that likewise emphasized in-state activities as the basis for the substantial nexus prong in the area of gross receipts taxes. Most notable among those decisions is *General Motors*, where the Court reviewed a tax imposed upon a large corporation with a massive interstate business (and sales levels), and held that its "local incidents were sufficient to form the basis for the levy of a tax that would not run contrary to the Constitution." 377 U.S. at 447-448; *see also Norton Co.*, 340 U.S. at 537 (state lacks authority to impose gross receipts tax on company with no "local incident" in the state).

The reasons for the in-state activities requirement run deep within the Commerce Clause itself. The taxing power of the States must have limits, lest interstate commerce be substantially curtailed. The substantial nexus requirement is part of the test devised by the Supreme Court to avoid such undue burdens on interstate commerce, pending Congressional action otherwise. *See*

[14]The Washington Supreme Court had similarly framed Tyler Pipe's argument as "whether its connections with the State of Washington were sufficient to satisfy constitutional standards for the imposition of Washington's B&O tax." *See Tyler Pipe Indus., Inc. v. Dept. of Revenue,* 105 Wash.2d 381, 323, 715 P.2d 123, 126 (1986).

Quill, 504 U.S. at 313, 318. Making sales to customers in a state is not enough. Successfully engaging in interstate commerce and growing a market in a state is not enough. If it were, then every company with the good fortune to sell across state lines would be exposed to the varying tax obligations of potentially thousands of different jurisdictions around the country. Commerce alone cannot be the basis for state taxing and regulatory power under the dormant Commerce Clause, which *limits* state power over interstate commerce and assigns to Congress the responsibility for its regulation.

G. *Stare Decisis* Requires The Application Of The *Tyler Pipe* Standard.

As noted above, neither *Quill* nor any other case calls into question the in-state activities standard of substantial nexus established in the *Tyler Pipe* line of cases. As a result, as discussed by the Appellant in its Merit Brief (Applt. Br. at 44-45), the principles of *stare decisis* dictate the conclusion that R.C. 5751.01(I)(3) is unconstitutional.

Indeed, even if there were doubt regarding the viability of the *Tyler Pipe* standard, it must still be followed. As the Supreme Court has made clear, if the "precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions," lower courts "should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodrigues de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989). The strength of this principle is illustrated by *Tenet v. Doe,* 544 U.S. 1, 125 S.Ct. 1230, 161 L.Ed.2d 82 (2005). In *Tenet,* the Court reviewed the continuing viability of a rule established in a Civil War era case. *See id.* at 3 (discussing *Totten v. United States,* 92 U.S. 105, 23 L.Ed. 605 (1875)). The Court of Appeals read an intervening decision as limiting *Totten,* but the Supreme Court disagreed. *Tenet*, 544 U.S. at 8-9. Citing *Rodrigues de Quijas,* the Supreme Court chastised the lower court for failing to apply directly controlling precedent, in favor of related authority the lower court construed as undermining it. *Id.* at 10-11.

Adherence to settled precedent is particularly important in the area of Commerce Clause jurisdiction. When deciding whether to overrule the physical presence Commerce Clause requirement for use taxes declared in a prior case, the *Quill* Court noted that even if it were convinced that the prior decision was incorrect under the Commerce Clause, the very fact that it was a Commerce Clause case counselled against overruling the decision because Congress has the power to change the result As the Court explained, "the better part of both wisdom and valor is to respect the judgment of the other branches of the Government" and defer to Congress. *Quill*, 504 U.S. at 318-319 (quoting *Commonwealth Edison Co*., 453 U.S. at 638).

H. The Commissioner's Proposed Theories Of Nexus Present A Clear Danger Of Undue Burdens Being Imposed On Interstate Commerce From Conflicting Gross Receipts Tax Obligations In Multiple Jurisdictions.

The Commissioner correctly states that the "substantial nexus" prong of the *Complete Auto* test serves as "a means for limiting state burdens on interstate commerce." *Quill*, 504 U.S. at 313; (Commissioner Br. at 31). Indeed, the substantial nexus test is informed "by structural concerns about the effects of state regulation on the national economy." *Quill*, 504 U.S. at 312.

The Court in *Quill* described the particular burdens that can result from a company being subjected to differing, and potentially conflicting tax obligations in multiple jurisdictions. The Court explained that the "many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements could entangle [a company] in a virtual welter of complicated obligations." *Quill*, 504 U.S. at 313 n.6 (citing *Bellas Hess*), 386 U.S. at 759-760). Although the Commissioner argues that the CAT is easy to administer (a debatable point),[15] his

[15]The CAT is not so "extraordinarily simple" as the Commissioner suggests. (Commissioner's Br. at 31).There are some 36 different exclusions from the definition of "gross receipts." *See*

argument fundamentally misunderstands the nature of the concern expressed by the Court in *Quill* and other court decisions. The issue is not whether a single state's tax obligations are burdensome, but whether a company doing business in interstate commerce would be exposed to differing rates, exemptions, reporting obligations, and recordkeeping obligations in every state and locality that may impose a similar tax. The gross receipts, "bright-line presence" provision of the CAT (and the Commissioner's other nexus theories) present a danger of a myriad of conflicting gross receipts tax obligations for companies making sales via catalog, and now the Internet, that was present in *Quill*.

There are already a number of states and major municipalities that have gross receipts taxes. Applt. Br. at 41-42. A ruling that gross receipts alone are sufficient to establish nexus could lead to many more states following suit. Indeed, beyond the prospect of every state enacting a business activity tax measured by gross receipts, municipal level gross receipts taxes could mushroom. In addition to the municipal gross receipts taxes identified in Appellant's Merit Brief, there are many others already on the books. For example, at least 40 cities in Washington have municipal B&O Taxes, the direct analog to the CAT. *See* Municipal Research Services Center, Business and Occupation Taxes. These local gross receipts taxes are set at different rates and sales thresholds. *See* Ass'n of Washington Cities, City Business (B&O) Rates (Jan. 1, 2015). There are also several other states that also authorize municipalities to levy gross

---

R.C. 5751.01(F)(2). In addition, there is a $150,000 gross receipts threshold, to which these exemptions apply, for determining a company's obligation to report the CAT. R.C. 5751.01(E)(1). Depending upon the nature of a company's business (e.g., sale of goods, provision of services, rental of property, royalty income) there are differing rules for the "situsing" of receipts. R.C. 5751.033. Companies that are part of a corporate family may, or may not, be required to report the CAT together as a combined group, depending upon the ownership structure. R.C. 5751.012. Related companies may have the option of reporting as a consolidated elected group, although this eliminates the $150,000 exemption. R.C. 5751.011, 5751.01(E)(1). Moreover, the CAT must be reported quarterly. R.C. 5751.051(A)(1). As indicated by the multiple underlying Petitions for Redetermination required to be filed by Appellant, appeals from CAT must be filed for each quarterly assessment.

receipts taxes, including California, Missouri, and South Dakota, among others. *See* Applt. Br. at 42 (citing San Francisco and Los Angeles gross receipts taxes); *see also,* Missouri Municipal League, Taxation and Revenue in Missouri Municipalities (rev. Jan. 2009), pages 65- 73 (listing Missouri Municipal Business License Fees for hundreds of cities, many of which are based on gross receipts) (*e.g.*, City of Savannah, 5% of gross receipts; City of Crestwood, 0.0125% of gross receipts), South Dakota Dep't of Revenue & Reg., Municipal Tax Information Bulletin (Jan. 2011) at 4-8, (listing municipalities with gross receipts taxes).

Furthermore, organizations representing the interests of not only every state (the National Governor's Association, National Conference of State Legislatures), but also over 19,000 cities (the National League of Cities) and 3,600 counties (the National Association of Counties), have submitted an *amicus* brief urging the Court to approve the CAT's expansive gross receipts nexus standard that would allow their members to follow suit and impose local taxes without regard to whether a company engages in activities in the jurisdiction directly, or through third-parties. *See* Brief of Amici Curiae National Governors Association, *et al.*, at 1-2). The *Quill* Court's concern about the burdens on interstate commerce of divergent tax obligations in more than 6,000 jurisdictions could easily be dwarfed if these localities were free to impose gross receipts tax on any business, without regard to whether it engaged in local activities. *See Quill*, 504 U.S. at 313 n.6. Under the principles of nexus advocated by the Commissioner and his supporting *amici*, businesses across the nation might soon be required to report and pay gross receipts taxes in every state and in municipalities from Los Angeles to Philadelphia, and all points in between.

A nationwide system of gross receipts taxes unlimited in their application by the *Tyler Pipe* standard of substantial nexus could undermine the fundamental objectives of the Commerce Clause in other ways. Because gross receipts taxes are taxes levied directly on the seller, rather than taxes that the seller collects from the buyer, they directly affect the seller's bottom line. A proliferation of gross receipts taxes across thousands of jurisdictions will not only present enormous compliance burdens, but will also result in disincentives for sellers to do business in unprofitable markets. Such a system would promote the very kind of "Balkanization" the Commerce Clause is designed to prevent. *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 577 117 S.Ct. 1590, 137 L.Ed.2d 852 (1997).

I. Congress Is The Body Which Must Address Any Expansion Of Substantial Nexus Principles.

A company's location when engaging in business, either directly or through third-party representatives, remains significant under the Commerce Clause because state borders are a necessary component in defining the limits of state taxing and regulatory authority. Borders are, to a certain extent, artificial as they relate to commerce. A person located in Cincinnati, Ohio can enter into the exact same transaction with a business partner in Louisville, Kentucky as she can with a person in Columbus. The state's authority to regulate these transactions is, however, dramatically different because of the dormant Commerce Clause. Between citizens of its own state, Ohio may impose different—and even remarkably burdensome—tax or regulatory requirements that it cannot impose with regard to a transaction occurring across state lines.

The Framers understood that the authority of States to tax and regulate interstate commerce had to be limited in a manner that respected each State's autonomy within its borders, but also protected commerce occurring across state lines from undue burden. In upholding this core principle, the Supreme Court distilled the four-prong test of *Complete Auto*, in which the "substantial nexus" prong plays a significant role in protecting interstate commerce from undue burdens. *See Quill*, 504 U.S. at 313. By establishing a requirement of in-state activities as the touchstone of "substantial nexus," the Supreme Court could be secure in the knowledge that the Congress may, consistent with the Framers' vision of our federalist system, adopt such measures as are necessary to balance the States' proper tax and regulatory objectives against the goal of a free-flowing national marketplace. *See Quill*, 504 U.S. at 318 (finding that upholding the Commerce Clause physical presence test for use tax collection "is made easier by the fact that the underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve").

The exotic and expansive nexus theories advanced by the Commissioner offend these principles because they would dramatically change the conditions under which Internet and other interstate sellers do business in a national market. Indeed, each of the Commissioner's theories represents the kind of change that should only be made through careful legislative consideration and balancing of the competing interests of the States against the potential burdens on the national marketplace. Those kinds of judgments, and the responsibility for regulating interstate commerce, were assigned by the Framers to Congress—not to the Ohio General Assembly, the Commissioner, or even this Court. In the area of Internet taxation, the Congress has previously passed the Internet Tax Freedom Act ("ITFA"), prohibiting states from targeting electronic commerce with discriminatory tax obligations. *See* 47 U.S.C. 151 (note) (2014). A bill to make the ITFA permanent passed the House of Representatives earlier this year. H.R. 235, Permanent Internet Tax Freedom Act (114th Cong. 2015-2016). Even more significant to this appeal, federal legislation regarding the proper nexus standards to apply in the area of business activity taxes, introduced by Representative Chabot (R-OH), is also currently pending before the House. H.R. 2584, Business Activity Simplification Act of 2015 (114th Cong. 2015-2016). In an area where Congress is actively considering legislation, judicial action to expand state authority to impose tax obligations on interstate commerce would be particularly inappropriate.

> **<u>Proposition of Law 2</u>**: The CAT statute is unconstitutional as-applied to Crutchfield by the Commissioner. Imposition of the CAT against Crutchfield, a company with no in-state presence in Ohio, violates the "substantial nexus" standard of the Commerce Clause

as established under numerous decisions of the United States Supreme Court. *E.g., Tyler Pipe*, 483 U.S. at 250-251; *Commonwealth Edison*, 453 U.S. at 626; *Std. Pressed Steel*, 419 U.S. at 562; *Gen. Motors*, 377 U.S. at 447-448. Merely obtaining gross receipts in excess of $500,000 annually does not establish constitutional "substantial nexus" under long-standing Supreme Court authority, so applying the CAT based solely on Crutchfield's gross receipts from sales of goods delivered to Ohio customers violates the Constitution. In addition, because Crutchfield engaged in no business activities within the State of Ohio sufficient to satisfy the constitutional "substantial nexus" standard, application of the CAT to Crutchfield on any other basis, whether separate from or together with its gross receipts, is also unconstitutional.

A. As Applied To Appellant By The Commissioner, The CAT Violates The Commerce Clause Substantial Nexus Requirement.

The Commissioner now seeks to justify the assessment on the ground that Appellant satisfies the *Tyler Pipe* standard through its marketing activities, even though all of the Appellant's marketing activities were national in scope and conducted via instrumentalities of interstate commerce. As such, they are also inadequate to establish substantial nexus with Ohio. *See Natl. Bellas* Hess, 386 U.S. at 758 and n.11 (explaining that state tax administrators "have generally considered an advertising nexus insufficient" to require a seller to "participate in the tax collection system," and citing *State v. Lane Bryant, Inc.*, 277 Ala. 385, 171 So.2d 91 (1965)). No court has held that "advertising nexus" is sufficient for the imposition of a gross receipts tax.

Beyond that fundamental infirmity, the Commissioner's argument that Appellant has substantial nexus under *Tyler Pipe* essentially has three parts: (1) Appellant has a "substantial economic presence in Ohio" –an argument which fails for reasons explained above; (2) Appellant has a "virtual" presence in Ohio through its Internet marketing and online activities, which, although conducted entirely from locations outside the state, depend upon interacting with Ohio customers in sophisticated ways, resulting in, according to the Commissioner and his *amici*, the "functional equivalent" of a physical presence; and (3) Appellant purportedly has "business partner" in Ohio that assist it to make and maintain a market for sales in the state. The Commissioner's contentions are without support.

The Commissioner's "virtual" presence theory fails under the *Tyler Pipe* in-state activities standard applicable to the CAT. Thus, while the Commissioner drastically distorts the record in an effort to portray Appellant as "present on the computers of Ohio citizens," or "following Ohio consumers around the Internet," or "harvesting data from Ohio customers," even the picture painted by the Commissioner does not include *any* activity sufficient to satisfy *Tyler Pipe*.

Moreover, there is no evidence that Appellant "targeted" Ohio in any way. The Commissioner's blanket statement that "Crutchfield directed its actions to consumers in Ohio in an attempt to grow and maintain its consumer base in this state" has no support in the record. (Commissioner Br. at 1). To be sure, there is no dispute that Appellant has successfully pursued, and established, a national, geographically agnostic market. The inclusion of Ohio within the national marketing and sales efforts of Appellant provides no support for the contention that Ohio or its consumers have somehow been "targeted" by Appellant.

What the Commissioner advocates, therefore, is a doctrine of nationwide nexus for all national marketers. Under this doctrine, conducting remote sales activity on a nationwide basis without differentiating between customers of different states would form the basis for nexus anywhere, and *everywhere,* a customer or potential customer resides. The Commissioner's theories only get more extreme when considered with greater specificity.

B. No Activities Were Performed In Ohio On Behalf Of Crutchfield That Are Significantly Associated With Crutchfield's Ability To Establish And Maintain A Market In Ohio For Sales

First, it is important to set the factual record straight. The only fact witnesses to testify at the hearing about Crutchfield's business were its Senior Vice President of Finance, Mr. Stavitski, and its Director of Internet Marketing, Mr. McCartney. Each of Mr. Stavitski and Mr. McCartney testified that Crutchfield had no agents, representatives, or employees performing any activities in Ohio, let alone activities to establish and maintain a market in Ohio. (Suppl. 6-7, 11-12, Hearing Transcript October 20, 2014 at 20-22, 41-42). In addition, after a detailed review of Crutchfield's marketing activities, Crutchfield's expert witness, Mr. Goldman, testified that neither Crutchfield nor persons acting on its behalf engaged in any activities in Ohio; all of Crutchfield's marketing activities were by interstate connections from outside of Ohio to locations in this state. (Suppl. 189-190, Goldman Expert Report at 2-3; Suppl. 147, 152, 154, Hearing Transcript October 16, 2014 at 46-48, 66-68, 75-76). Nor did the expert witness testimony and the many exhibits offered by the Commissioner to the Board provide any evidence of *any* activities performed in Ohio on behalf of Crutchfield for the simple reason that there were no such activities.

1. <u>Contrary to the Commissioner's Claim, Crutchfield Did Not Have A Business Partner Who Acted In Ohio.</u>

Without any basis in the record, the Commissioner claims that Crutchfield had a business partner, Akamai, that "acted in Ohio in efforts to grow Crutchfield's market." (Commissioner Br. at 42). Citing the testimony of Crutchfield's McCartney, the report of the Commissioner's expert, Soltani (Suppl. Ex. 38), and a document not found in the Supplement and identified by the Commissioner as Exhibit 11, the Commissioner asserts that Akamai delivered items from Crutchfield's website from Ohio servers and "stores them locally [on servers] in Ohio" during the tax period. (Commissioner Br. at 42). None of the sources cited by the Commissioner provide any support for the conclusion.

Mr. McCartney testified that it "sounds correct" that "Akamai was a content distribution network for Crutchfield during that time period." (Suppl. 23, October 20, 2014 Hearing Transcript at 88-89). He, however, did not know whether Crutchfield employed third parties such as Akamai to deliver or store items from its websites. *Id*. Nor did he testify that Akamai stored items in Ohio or delivered items from Ohio during the tax period. *Id*. Similarly, as Mr.

Soltani confirmed in his testimony, he did not know if Akamai had servers located in Ohio during the tax period. (Suppl. 78, Hearing Transcript October 16, 2014 at 39) ("During the time period, I do not know if Akamai had assets in Ohio."). Nor did he know if Akamai delivered items on behalf of Crutchfield from Ohio. (*Id*. at 110; Transcript at 167-8)("Q. So even if there were servers in Ohio, you don't know whether they were used by Crutchfield under a contract with Akamai? A. Right."). This is so because all of his work was in April 2014, long after the tax period had closed. (*Id*. at 78; Transcript at 38).[16] Finally, Exhibit 11 cited by the Commissioner is a Confidentiality Agreement with Blue Hill Marketing, and has nothing to do with Akamai.[17]

2. <u>Crutchfield's Online Marketing Activities Were Conducted In Interstate Commerce From Locations Outside Of Ohio, And, Therefore, Do Not Constitute Activities Performed On Its Behalf In Ohio Under the *Tyler Pipe* Test.</u>

Although the Commissioner correctly recites the substantial nexus test of *Tyler Pipe* that "the crucial factor governing nexus is whether the activities performed *in this state on behalf of the taxpayer* are significantly associated with the taxpayer's ability to establish and maintain a market in this state for sales," (emphasis added), the Commissioner ignores this requirement.

[16]The Commissioner notes in footnote 5 of its brief that Mr. Goldman testified that Crutchfield used Akamai, but fails to mention that Mr. Goldman *never* stated that Akamai acted on Crutchfield's behalf *in Ohio*. In fact, Mr. Goldman testified that Akamai does not disclose the location of the servers it uses to provide service to its customers. (Suppl. 171, Hearing Transcript October 16, 2014 at 144). Akamai did not permit the parties it contracted with to specify the location of its servers. (Suppl. 111, Hearing Transcript October 16, 2014 at 170).

[17]In the Introduction, the Commissioner claims that "Crutchfield arranged to provide repairs and warranties for the products it sold in Ohio," but provides neither citation to the record nor relies on that statement to assert that Crutchfield had a business partner who acted in Ohio. (Commissioner Br. at 6, 42-43). That is because the statement has no basis in the record. As discussed in Appellant's Main Brief at 12, Crutchfield had no role in the provision of service between Service Net/Square Trade and the customer and Crutchfield was not involved in or had any responsibility for any repairs. Service Net/Square Trade were not acting on behalf of Crutchfield.

Instead, the Commissioner contends that online interstate marketing activities conducted from outside of Ohio that increase Ohio sales create substantial nexus because “Crutchfield does all of the same activities,” as the sales representatives did in *Tyler Pipe* “in pursuit of its internet sales market in Ohio.” (Commissioner Br. at 39). The Commissioner’s argument is fundamentally at odds with *Tyler Pipe*.

The Commissioner engages in the hyperbole that “the creation of Crutchfield’s virtual store happens in Ohio,” such that the Crutchfield website was “assembled in Ohio, on Ohioans’ computers, by Crutchfield through the web browser” and that Crutchfield obtained valuable customer data “through the use of tracking devices such as cookies.” (Commissioner Br. at 11, 40). In fact, as the Commissioner’s expert Soltani testified and as both Mr. Soltani and Professor Goldman described in their reports, the connection by an Ohio resident to Crutchfield’s web site is a “typical web interaction, whereby, a user, by means of a web browser, connects to a website or web server, and makes a request for some content, typically, a web page, and is issued a response, which is the contents of that web page, plus additional instructions to the browser, including cookies. * * * ” (Suppl. 71, Hearing Transcript October 16, 2014 at 11-12; *see also* Suppl. 189, 609-613.) It is the Ohio computer user’s decision to access the Crutchfield Virginia website, using the user’s own browser, which is software owned by the computer user and located on the user’s computer, that causes the computer to display the web page of the site the user visits. (Suppl. 102, Soltani Hearing Transcript October 16, 2014 at 135-136; Suppl. 147, 151, Goldman Hearing Transcript October 16, 2014 at 49, 63-64; Suppl. 189-190, Goldman Report).

The connection between the user and Crutchfield is merely an interstate connection no different than the receipt of a catalog by the mails or a telephone call from an out-of-state location to the user in Ohio; each involves communication between an out-of-state location and an Ohio resident by use of the instrumentalities of interstate commerce, including telephone lines and the Internet where the seller and the buyer are not in the same physical space. (Suppl. 189-190). The activity in Ohio is conducted by the user on the user's computer, at the user's (and not Crutchfield's) initiative, and on the user's own behalf, not as an agent or representative of Crutchfield. There was not a third party soliciting sales or visiting with possible and actual customers in Ohio. There are only two parties to the interaction, as confirmed by both parties' experts: Crutchfield and the Ohio computer user, in which the browser, acting on behalf of the user, communicates with the Crutchfield web server located in Virginia. (Suppl. 128, Hearing Transcript October 16, 2014 at 239-240; Suppl. 150-152, Goldman Hearing Transcript October 16, 2014 at 60-66; Suppl. 189-190).

While its experts have claimed that Appellant engages in "local interactions," all such interactions were between a web site user and his/her browser. Suppl. 71, 125-126, Soltani Hearing Transcript October 16, 2014 at 11-12, 229-231). In truth, there were no such "local interactions" between Crutchfield and its customers. Rather, all communication from Crutchfield came from outside of Ohio and all communications from customers were received outside of Ohio. *Id*.

Nor does the use of cookies, which are ubiquitous on the Internet, transform Crutchfield's activities into an in-state business activity conducted on its behalf. Contrary to the Commissioner's claim , a cookie is not a tracking or recording device. (Suppl. 305; August 13, 2014 Deposition Transcript).[18] As the Commissioner's own expert Soltani admits, a cookie is merely a digital file containing a string of numbers, much like a license plate, that is used to identify the computer (but not the individual) when the computer connects to the Crutchfield

[18]Crutchfield does not use cookies or any other device to follow a visitor to its website to other websites, as the Commissioner claims. (Suppl. 14; Hearing Transcript October 20, 2014 at 52-53).

website. (Suppl. 82, 103, Hearing Transcript October 16, 2014 at 54-57, 139-141). A cookie does not transmit information itself, but all information is transmitted over the Internet from the computer user to the Crutchfield website located outside of Ohio. (Suppl. 74, 102, Hearing Transcript October 16, 2014 at 23-24, 134-136; Suppl. 189-190). A user can delete any and all of the cookies that have been sent to his or her computer at any time, and can even decline to accept any cookies by adjusting the settings on his/her computer. (*Id.* at Suppl. 82; Suppl. 148-149, Hearing Transcript October 16, 2014 at 51-54).[19]

Similarly, all of the marketing activities relied upon by the Commissioner, including paid search, email marketing, shopping comparison, search ads, and display ads, occurred outside of Ohio. (Suppl. 12-13, 15, Hearing Transcript October 20, 2014 at 42, 48, 54; Suppl. 524-525, 529-532).[20] Likewise, the customer data that Crutchfield obtained was transmitted by interstate transmission to Crutchfield and its service providers outside of Ohio via the Internet. (*Id.*, Suppl 189-190). Just as making a sale via the Internet, or by telephone or mail, provides a benefit to Crutchfield, the fact that the data obtained may have value to Crutchfield does not mean that Crutchfield has engaged in any activities in Ohio.

The record is clear that Crutchfield's website was not designed or used to target Ohio residents, and geography played no role in its marketing. (Suppl. 12-13, Hearing Transcript October 20, 2014 at 45-49.) The very same Crutchfield website was available throughout the world. (*Id.*; Suppl. 119, Hearing Transcript October 16, 2014 at 204-205.) Under the Commissioner's logic, Crutchfield would have nexus throughout the world, and an Ohio-based

[19]Nor can Crutchfield access the cookie by initiating a connection with the computer, and if the computer user never returns to the Crutchfield website then Crutchfield will not have access to the cookie. (Suppl. 24, Hearing Transcript October 16, 2014 at 92).

[20]The Commissioner states, without any citation to the record, that Crutchfield used affiliate programs (Commissioner Br. at 40), but Crutchfield did not do so.

company that does business on the web from a server located in Ohio would be exposed to a privilege tax throughout the United States because its website is accessed by persons located in other states.

In short, the Commissioner's conclusion that "Crutchfield used these marketing tools and locally-produced data to refine its sales approach, and grow its market in Ohio, thereby easily satisfying the criteria for substantial nexus under *Tyler Pipe*" is incorrect, because it ignores the *Tyler Pipe* long line of Supreme Court cases. (Commissioner Br. at 13). Effect, without in-state activity, is not enough to provide substantial nexus.

3. Crutchfield Had No Tangible Personal Property Or Other Physical Presence In Ohio That Would Satisfy The *Tyler Pipe* Commerce Clause Test.

The Commissioner claims that Crutchfield maintains certain assets in Ohio. The assets to which the Commissioner refers is the digital information electronically transmitted from Virginia to the computers of Ohio persons who visit the Virginia web site of Crutchfield; the information is received, displayed and sometimes stored as a file on a visitor's own computer. Specifically, when a consumer navigates to the address of Crutchfield's server, the consumer requests information from Crutchfield, which is the contents of Crutchfield's website. In response, Crutchfield sends digital information, in the form of hypertext mark-up language ("HTML") and the JavaScript language, which is received by the user's computer and converted, by the user's browser, into the visible web page. In addition, the Commissioner refers to a mobile app, which is software developed by Crutchfield and electronically transmitted to the customer. Commissioner's Br. at 44-45). According to the Commissioner, this software is tangible personal property of Crutchfield and because it is located in Ohio constitutes a physical presence of Crutchfield in Ohio.

The Commissioner's argument lacks merit for three reasons. First, electronically transmitted information is *not* tangible personal property. The case cited by the Commissioner, *Andrew Jergens Co. v. Wilkins*, 109 Ohio St.3d 396, 2006-Ohio-2708, 848 N.E.2d 499 (2006), held that the purchase by a business of prewritten software received on a tape, disc or other medium, constitutes tangible personal property for purposes of the personal property tax. *Id*., 109 Ohio St.3d at 399. As the Court noted, for purposes of the sales tax, purchases of magnetic tapes that contain software are taxable, because "the medium on which the intellectual effort is transferred is tangible personal property and subject to sales tax." *Id*. at 398, quoting *Community Mut. Ins. Co. v. Tracy*, 73 Ohio St.3d at 371, 376, 653 N.E.2d 220 (1995). To similar effect are the other decisions cited by the Commissioner, including *Wal-Mart Stores, Inc. v. City of Mobile*, *Comptroller of the Treas. v. Equitable Trust Co.*, 296 Md. 459, 484, 464 A.2d 248 (1983) (tax applies to software transferred on tape), and *S. Cent. Bell Tel. Co. v. Barthelemy*, 643 So.2d 1240, 1246 (La. 1994) (discussing software physically recorded on some tangible medium). In each of these cases, the software was transferred on a tangible medium.[21]

Second, the electronic communications the Commissioner and its expert refer to is a "virtual presence" (Suppl. 124-125, Hearing Transcript October 16, 2014 at 227-230), have no physical dimension. A cookie is not physical property; it cannot be touched and felt and does not occupy any space. (Suppl. 155-156, Hearing Transcript October 16, 2014 at 80-82; Suppl. 189-190). [22] While Crutchfield has certain rights in the software transferred, those are the intangible

[21]No software is transferred by Appellant on a tangible medium. Notably, it is the user, not Appellant, that owns the computer hard drive that temporarily saves the HTML code or images. It is also noteworthy that the case cited by the Commissioner, *Microsoft Corp v. Franchise Tax Bd.*, 212 Cal. App. 4th 78, 150 Cal.Rptr.3d 770 (2012), stands for the opposite proposition that the Commissioner says it does. In particular, the Court in that case, found that "the trial court erred in concluding that the OEM licenses [to software] pertain to the licensing of tangible personal property." *Id*. at 95.

[22]As Professor Goldman testified,

rights to the copyrights in the intellectual property. (Suppl. 174, Hearing Transcript October 16, 2014 at 154-157). Under 28 U.S.C.1338, the federal courts (and not the state courts of Ohio, as suggested by the Commissioner) provide the exclusive jurisdiction for protecting and enforcing such rights, as found in each of the cases cited by the Commissioner. *See* Commissioner Br. at 45); *see also ClearCorrect Operating, LLC v. Internatl. Trade Commn.*, Fed Cir. No. 2014-1527, 2015 WL 6875205, at *1 (Nov. 10, 2015) ("We recognize, of course, that electronic transmissions have some physical properties—for example an electron's invariant mass is a known quantity—but commonsense dictates that there is a fundamental difference between electronic transmissions and 'material things.'").

Third, the storage by Ohio computer users of electronic information on their own computers does not establish a physical presence than does the maintenance by Ohio residents of catalogs published by an interstate marketer. See *Quill*, 504 U.S. at 304, 311-319. As importantly, it does not establish that either Crutchfield or its agents or representatives engaged in any activities in Ohio. All of the communications between Crutchfield and its Ohio customers occur across state lines.

The Commissioner is unabashed in his advocacy for a new and unlimited concept of substantial nexus, based on ephemera such as "cookies," HTML code, and digital images. He invites this Court to boldly go where no court has gone before, out onto the borderless frontier of

---

"Electronic communications don't fit into either bucket. They're not real property. They're not a point on the sphere of the earth. Nor are they movable physical -- I'm sorry – movable personal property in the sense of cars or computers. Hardware that has a physicality to it. So the fact that Crutchfield had electronic pulses that were moving over an electronic network doesn't have any attribute of physical property. . . . But the storage of those electronic signals doesn't create –have any physicality to it. It doesn't create a physical item. It's simply a reshuffling of electrons on a physical item that the user owns him or herself. (Suppl. 155-156, Hearing Transcript October 16, 2014 at 80-84).

Internet nexus. But where the Commissioner would go, the Constitution, and the Supreme Court, wisely dictate that this Court cannot follow.

> **<u>Proposition of Law 3</u>**: The assessments against Crutchfield are invalid under the CAT Statute, when its terms are properly construed to avoid constitutional infirmities. Multiple provisions of the CAT statute may be reasonably construed so as to prevent the application of the CAT to Crutchfield, an out-of-state retailer with no physical presence in Ohio, including R.C. 5751.02(A), R.C. 5751.01(H)(3) and (I)(3) and R.C. 5751.01(F)(2)(jj).

A. The Commissioner's Interpretation Of The CAT Statute Renders The CAT's Gross Receipts "Bright-Line Presence" Provision Unconstitutional.

The Commissioner begins his defense of the CAT gross receipts "bright-line presence" provision by insisting that there is no interpretation of the CAT statute that would avoid placing the statute directly at odds with the "substantial nexus" standard of the Commerce Clause. The Commissioner contends that R.C. 5751.02(A), the statutory section that levies "a commercial activity tax on each person with taxable gross receipts for the privilege of doing business in this state," cannot be read to apply solely to those companies that have the requisite substantial nexus under the Commerce Clause because the statute, by its plain terms, requires that the CAT must be applied not only to persons having substantial nexus with the state, but "also to those persons who do *not* have substantial nexus with Ohio." (Commissioner Br. at 21). The Commissioner fails to recognize that this argument requires that the Court must read the statute to violate the first prong of the *Complete Auto* test, which prescribes "substantial nexus" as the basic constitutional requirement for all state taxes. 432 U.S. at 279; *Commonwealth Edison*, 453 U.S. at 626 (an interstate business "must have a substantial nexus with the State before *any* tax may be levied on it.") (Citation omitted). [23]

[23] The cliff over which the Commissioner drives the statute is readily apparent. Under R.C. 5751.01(H), the term "substantial nexus with this state" is defined to include any person that: (1) owns or uses capital in Ohio; (2) holds a certificate to do business issued by the state; (3) has so-called "bright-line presence" in the state; and, in addition (4) "*[o]therwise has nexus with this*

The Commissioner's blind insistence that the CAT statute is not susceptible of a reading that would preserve its constitutionality appears driven by a motivation to force this Court to make a constitutional ruling. (*See* Commissioner Br. at 24 (refusing to accept any possible limiting construction)). Postured in this manner, the CAT's gross receipts "bright-line presence" provision clearly runs afoul of the Commerce Clause substantial nexus test established in the *Tyler Pipe* line of cases for state taxes measured by gross receipts. But the supposed "legislative objective" of having a clear rule, (*see id.* at 25), should give way to a reasonable construction of the statute that preserves its constitutionality. *E.g., SFA Folio Collections, Inc. v. Tracy*, 73 Ohio St.3d 119, 652 N.E.2d 693 (1995). And as discussed in the next section, the statute is not clear. This "all or nothing" approach of the Commissioner also contradicts the legislature's provision allowing swift constitutional review of the narrow "bright line" rules, but not challenges to the overarching constitutionality of the CAT. R.C. 5751.31 (authorizing a targeted challenge to "bright line presence" standards only, evincing severability); (Suppl. at 681, 687-689).

B. The Constitutional Catch-All Provision Of R.C. 5751.01(H)(4) Undermines The Commissioner's Reading Of The Statute.

It is noteworthy that the inclusion by the General Assembly of the constitutional catch-all provision of R.C. 5751.01(H)(4) undermines another leg of the Commissioner's argument. The Commissioner repeatedly insists that the "bright-line presence" provisions were adopted in order to give the Commissioner clear, objective standards for imposing the CAT that would not require the Commissioner to interpret a "*case law* legal standard" of substantial nexus. (*See* Commissioner Br. at 22). Such clear standards, the Commissioner argues, are rendered "entirely

---

state to an extent that the person can be required to remit the tax imposed under this chapter under the Constitution of the United States." (Emphasis added.) R.C. 5751.01(H)(1) – (4). The CAT statute, therefore, purports to extend the applicability of the tax to the limits of the U.S. Constitution. The Commissioner then argues that the terms of R.C. 5751.02(A) require that the CAT be applied *beyond* those limits, into constitutionally forbidden territory.

meaningless" if the gross receipts "bright-line presence" provisions must be interpreted, as Appellant suggests, so as not to run afoul of the Commerce Clause *Tyler Pipe* test. *(Id.)*. However, the inclusion of the constitutional catch-all in subsection (H)(4) itself requires that the Commissioner interpret case law to determine whether a company has substantial nexus in all of the (arguably more difficult) instances in which none of the so-called "bright-line presence" standards are satisfied. In other words, the General Assembly directed the Commissioner to make difficult judgments about case law standards of constitutional nexus in all instances *other than* those where a different provision of R.C. 5751.01(H) plainly applies.

The Commissioner may believe—as the Board of Tax Appeals did— that he has no discretion to disregard the $500,000 gross receipts, "bright-line presence" provision mandated by the General Assembly, but the constitutional catch-all provision shows that the General Assembly did not intend to divorce the CAT statute entirely from constitutional standards.

C. Reasonable Interpretations To Retain The CAT Statute's Constitutionality, But Invalidate The Assessments, Are Available.

Appellant argues that, by its terms, Section R.C. 5751.02(A) imposes the CAT on each person "with taxable gross receipts for the privilege of doing business in this state," and that the term "doing business" means "engaging in any activity," thus allowing an interpretation of the statute that is consistent with the *Tyler Pipe* line of cases. (Applt. Brief at 46-47). The Commissioner never addresses this argument, but instead insists that the CAT statute is "unambiguous and clear on its face," requiring the Court to "apply the statute's plain terms." (Commissioner Br. At 24). Upon close scrutiny, however, the CAT statute is not a model of clarity, but can be read to require that the *Tyler Pipe* test must be satisfied to permit imposition of the CAT.

For example, the Commissioner's distinction between the taxability of persons and the taxability of gross receipts (Commissioner Br. at 23-24), breaks down quickly when exposed to the light of statutory language. Under R.C. 5751.02(A), the CAT tax is "levied . . . on each person with taxable gross receipts for the privilege of doing business in this state," which is defined as "engaging in any activity." In other words, the taxability of a person engaged in business activities is not separate from, but is rather *dependent upon*, having taxable gross receipts as well as business activity in the state. Thus, any exclusion from taxability for a "person" who is engaged in business in the state also depends upon the exclusion from taxation of the underlying receipts. This linkage may explain, in part, why the General Assembly included the language which makes clear that persons on which the CAT is levied include both those who have, and those who do not have, substantial nexus with the state—taxability under the CAT statute is driven, as a statutory matter, by the taxability of the receipts.

In addition, the Commissioner's argument that R.C.5751.02(A) requires taxation of persons without regard to whether they have substantial nexus itself renders all of the subparts of both R.C. 5751.01(H) and (I) effectively meaningless, because whether a person has "substantial nexus with this state" would make no difference whatsoever in evaluating whether the person must pay the CAT.

Finally, the language of former R.C. 5751.01(F)(2)(jj) is also ambiguous.[24] It provides that excluded from the definition of "gross receipts" are "[a]ny receipts for which the tax imposed by this chapter is prohibited by the constitution or laws of the United States or the

[24] The section was renumbered as R.C. 5751.01(F)(2)(kk) effective Sept. 29, 2015.

constitution of this state." The "tax imposed by this chapter" might be "prohibited" for a variety of reasons, not all of which are dependent upon the nature of the receipts.[25]

In the face of the statutory ambiguity, Appellant proposes a possible limiting construction under each of two provisions that might render the statute inapplicable to Appellant but consistent with the Constitution. First, the Court could determine that to have business activities within the state under R.C. 5751.02(A), a person must meet the in-state activities test of *Tyler Pipe*. Second, consistent with the former R.C. 5751.01(F)(2)(jj), the Court could conclude that taxable gross receipts do not include amounts obtained by a company that lacks substantial nexus.

III. LAW AND ARGUMENT
RESPONSE TO CROSS-APPEAL:

> **<u>Proposition of Law</u>:** The Commissioner's argument that Crutchfield failed to raise a constitutional challenge to the Board of Tax Appeals ("Board") lacks merit, because, as both the Commissioner recognized in submissions to the Board and the Board itself found, Crutchfield argued in its protest and throughout the proceedings in the Board that the CAT statute, as applied to Crutchfield, violated the Commerce Clause of the U.S. Constitution. This Court has rejected the Commissioner's very same argument in connection with its denial of the Commissioner's Motion to Dismiss.

In support of his Cross-Appeal, once again in this Court the Commissioner claims that, "[i]ndeed, as the Tax Commissioner explained in his Motion to Dismiss, Appellant *has never challenged the constitutionality of any CAT statute* in these proceedings, until now." Commissioner Br. at 2 (emphasis in original). The Commissioner repeats this false allegation by stating that "Appellant did *not* raise a constitutional challenge, whether facial or as-applied, to

[25] R.C. 5751.01(F), on which the Commissioner expends so much effort, does not define the taxability of gross receipts. Rather, the section defines "gross receipts," which are then taxable, under Section 5751.01(G) only if they are "sitused" to Ohio R.C. 5751.033.

the statutes that levy the CAT and make it applicable to Appellant." (Emphasis sic.) (Commissioner Br. at 26).

These statements are directly at odds with the Commissioner's representations to the Board below that it needed more time to do discovery in order "to develop a full record for the appellate court's review of the constitutional challenge." *See* Appellant Crutchfield Inc.'s Response In Opposition To Appellee's Motion To Dismiss Appellant's Assignment of Error Numbers 1 and 3" ("Opposition to Motion to Dismiss"), Appx. 2, Ex. 1, Commissioner's Motion to Designate Case as Complex Litigation And To Set a Case Management Schedule." There, the Commissioner stated that the appeal of Crutchfield "challenges the constitutionality of the Commercial Activity Tax 'CAT' nexus provisions *as applied to the Appellant*." (Emphasis added) (*Id*.). Commissioner reiterated subsequently that Crutchfield's appeal "challenges the constitutionality of the Commercial Activity Tax 'CAT' nexus provisions as applied to the Appellant." *Id.* at Appx. 7, Ex. 2, "Commissioner's Motion to Designate Case as Complex Litigation And To Set a Case Management Schedule."

Similarly, although the Board did not make a determination regarding the constitutionality of the CAT statute as applied to Crutchfield because, as an administrative tribunal, it lacked the authority to do so, the Board confirmed that Crutchfield's as-applied constitutional challenge was, in fact, the focus of the hearing:

> As we held in *L.L. Bean*, "this board makes no findings with regard to the constitutional questions presented. The parties through the presentation of evidence and testimony and the submission of briefs to this board, have set forth their respecting positions regarding the constitutional validity of the commissioner's application of the statutory provisions in question * * * and we find such arguments may only be addressed on appeal by a court which has the authority to resolve constitutional challenges."

(Citation Omitted.) (Appx.15-16).

As demonstrated in the Opposition to Motion to Dismiss, Appellant properly raised and asserted an as-applied constitutional challenge to the CAT as a result of the assessments in the case.[26] The requirement of raising such a challenge is to permit a record to be made for the appellate court to rule on the constitutional challenge. The parties had a full opportunity to make that record. Just as this Court denied the Commissioner's Motion to Dismiss, which as the Commissioner asserts in its appeal is based on the same grounds as the Commissioner's cross-appeal, the Court should reject the Commissioner's cross-appeal.[27]

IV. CONCLUSION

For the foregoing reasons, Appellant respectfully requests that the Court reject the Commissioner's imposition of the CAT against Appellant, reverse the decision of the Board of Tax Appeals that affirmed the Commissioner's assessments of CAT against Appellant, and order that the CAT assessments against Appellant be eliminated in their entirety

[26]Contrary to the Commissioner's representation here that Appellant has never raised the constitutional challenge to the CAT, the Commissioner recognized, when issuing its Final Determination that was appealed to the Board, that Appellant had raised the constitutional question. The Commissioner stated as follows:

> *The petitioner's overriding assertion is that the Commerce Clause of the United States Constitution precludes the State of Ohio from subjecting it to the commercial activity tax under the authority of R.C. 5751.01(H)(3) or (4).* The petitioner contends that the imposition of the tax pursuant to either (H)(3) or (H)(4) is improper because the petitioner allegedly does not have the nexus with Ohio that is required under the Commerce Clause. The Petitioner asserts that the nexus required is a "physical presence" in the taxing state, which it alleges it did not have during the assessed periods. (Emphasis added) (Appx. at 31).

[27] Appellant further relies on the arguments it made in its Opposition to Motion to Dismiss filed June 19, 2015.

Respectfully submitted,

/s Martin I Eisenstein
Martin I. Eisenstein (PHV 1095-2015)
(Counsel of Record)
David W. Bertoni (PHV 2436-2015)
Matthew P. Schaefer (PHV 2399-2015)
BRANN & ISAACSON
184 Main Street
P.O. Box 3070
Lewiston, ME 04243-3070
Tel.: (207) 786-3566
Fax: (207) 783-9325
Email: meisenstein@brannlaw.com
mschaefer@brannlaw.com

AND

Edward J. Bernert (0025808)
BAKER HOSTETLER
Capital Square, Suite 2100
65 East State Street
Columbus, OH 43215-4260
Tel.: (614) 462-2687
Fax: (614) 462-2616
Email: ebernert@bakerlaw.com

Counsel for Appellant/Cross-Appellee
Crutchfield Corp.

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing Second Merit Brief of Crutchfield Corp. was sent to the following via the electronic mail and served by U.S. and electronic mail to counsel of record on this 19th day of November, 2015:

Christine T. Mesirow (0015590)
Daniel W. Fausey (0079928)
Assistant Attorneys General
Office of the Attorney General
Taxation Section, 25th Floor
Rhodes Tower
30 East Broad Street
Columbus, OH 43215
Tel. (614) 466-5967
Fax (614) 466-8226
christine.mesirow@ohioattorney general.gov
daniel.fausey@ohioattorneygeneral.gov

Counsel for Appellee/Cross-Appellant, Joseph W. Testa, Tax Commissioner of Ohio

Peter G. Stathopoulos (PHV 7665-2015)
Macey, Wilensky & Hennings, LLC
303 Peachtree Street NE
SunTrust Plaza, Suite 4420
Atlanta, GA 30308
Tel: (404) 309-1132
Fax: (404) 681-4355
pstathopoulos@maceywilensky.com

Counsel for Amici Curiae, The Buckeye Institute for Public Policy Solutions, Mackinac Center for Public Policy, NetChoice, and American Catalog Mailers Association, Inc.

Robert Alt (0091753)
The Buckeye Institute for Public Policy
88 East Broad Street, Suite 1120
Columbus, OH 43215

Counsel for The Buckeye Institute for Public Policy

Mark A. Engel (0019486)
Anne Marie Sferra (0030855)
Bricker & Eckler LLP
9277 Centre Pointe Drive, Suite 100
West Chester, OH 45069
Tel: (513) 870-6700
Fax: (513) 870-6699
mengel@bricker.com

Counsel for Amici Curiae,
Ohio Manufacturers' Association
Ohio State Medical Association
Ohio Dental Association, and
Ohio Chemistry Technology Council

Bruce Fort (PHV 7779-2015)
Multistate Tax Commission
444 North Capitol St., NW, Suite 425
Washington, D.C. 20001
Tel: (202) 650-0300
bfort@mtc.gov

Counsel for Amicus Curiae, Multistate Tax Commission

Eric F. Citron (PHV 7790-2015)
Thomas C. Goldstein
Goldstein & Russell, P.C.
7475 Wisconsin Ave., Suite 850
Bethesda, MD 20814
Tel: (202) 362-0636
Fax: (866) 574-2033
ecitron@goldsteinrussell.com

Counsel for Amici Curiae, International Municipal Lawyers Association, Government Finance Officers Association, National Conference of State Legislatures, Council of State Governments, National Association of Counties, National League of Cities, U.S. Conference of Mayors, International City/County Management Association

Fredrick Nicely (0059627)
Nikki Dobay (0076919)
Council on State Taxation
122 C Street, NW, Suite 330
Washington, DC 20001
Tel: (202) 484-5222
Fax: (202) 484-5229
fnicely@cost.org
ndobay@cost.org

Counsel for Amicus Curiae Counsel on State Taxation

/s Edward J. Bernert
Edward J. Bernert (0025808)
One of the Attorneys for Appellant/Cross-Appellee, Crutchfield Corp.