No. 17-

IN THE
Supreme Court of the United States

T. RYAN LEGG IRREVOCABLE TRUST,

Petitioner,

v.

JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A state's coercive power to assert jurisdiction is subject to due process. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011). A state has *general* jurisdiction over its residents and may broadly subject them to its coercive power. By contrast, a state has only *specific* jurisdiction over nonresidents and cannot impose upon them an attenuated exercise of its coercive power.

Before a state may exercise one of its most coercive powers – the power to tax – over a nonresident, due process requires specific jurisdiction: some definite link, some minimum connection, between that state and both the person [*Quill Corp. v. North Dakota*, 504 U.S 298 (1992)] and transaction it seeks to tax [*Allied-Signal v. Dir., Div. of Taxation*, 504 U.S. 768 (1992)]. Yet, the Ohio Supreme Court held that Ohio could assert jurisdiction to tax over a nonresident and on a transaction with no identified or asserted connection to Ohio. The question presented is:

Did the Ohio Supreme Court err by applying the *general* jurisdiction due process rules applied in *Curry v. McCanless*, 307 U.S. 357 (1939) instead of the *specific* jurisdiction due process rules applied in *Quill* and *Allied-Signal*, to uphold Ohio's imposition of income tax against a nonresident trust taxpayer on its sale of stock in an Ohio-based company based solely on the contacts between Ohio and the trust's grantor (a different taxpayer), absent any contacts between the trust and Ohio, and absent a unitary business relationship between the trust and an in-state entity?

PARTIES TO THE PROCEEDING

The parties are as stated in the caption. In the court below, the Petitioner, T. Ryan Legg Irrevocable Trust, Reliance Trust Company of Delaware, Trustee, was referred to as T. Ryan Legg Irrevocable Trust, UBS Trust Company, N.A., Trustee. During the pendency of the litigation below, UBS Trust Company, N.A. merged with and into Reliance Trust Company of Delaware, a Delaware Limited Purpose Trust.

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PETITION FOR WRIT OF CERTIORARI

T. Ryan Legg Irrevocable Trust, Reliance Trust Company of Delaware, a Delaware Limited Purpose Trust, Trustee (referred to herein as the "Trust"), respectfully petitions for a writ of certiorari to review the judgment of the Ohio Supreme Court.

OPINIONS BELOW

The December 28, 2016 slip opinion of the Ohio Supreme Court is reprinted in the appendix hereto ("App.") at 1a. The Ohio Supreme Court's denial of the Trust's motion for reconsideration is reprinted at App. 52a. The May 5, 2015 decision of the Ohio Board of Tax Appeals is reprinted at App. 41a.

JURISDICTION

The judgment of the Ohio Supreme Court was rendered on December 28, 2016. The Ohio Supreme Court denied the Trust's timely motion for reconsideration on March 15, 2017. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution, U.S. Const. amend. XIV, § 1, provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

INTRODUCTION

Americans from all 50 states have increasingly begun to create trusts in states such as Delaware, which has long been considered to have personal trust laws that are "among the most favorable, if not THE most favorable in the country."[1] Among the reasons for this is that Delaware has adopted favorable tax rules for its resident trusts. And not just the wealthiest Americans do – or could – benefit from these trusts, as one in 11 U.S. households has a net worth of at least $1 million.[2]

In an effort to reap additional tax revenues, Ohio, however, has begun ignoring the legitimate separate form of, and legitimate transfers to, nonresident trusts – when they are taxpayers in their own right, including the Delaware Trust here. In doing so, Ohio's imposition of income tax on a nonresident trust – a trust which lacks the requisite minimum

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[1] Anne Marie Levin, *Year-End Wrap-Up—Why Are Delaware Trusts So Popular?* 40 EST. PLAN. REV.: THE JOURNAL, 239 (2014), *available at* https://www.cchgroup.com/media/wk/taa/pdfs/.../estate-planning-review-q1-2015.pdf.

[2] Marcia Pledger, *U.S. millionaires club adds 300,000, now at 10.4 million*, PLAIN DEALER, Mar. 10, 2016, *available at* http://www.cleveland.com/business/index.ssf/2016/03/us_millionaires_club_adds_3000.html, last visited July 9, 2017.

contacts with Ohio – has trampled upon this Court's bedrock due process jurisprudence enunciated in, *inter alia*, *Allied-Signal v. Dir., Div. of Taxation*, 504 U.S. 768 (1992).

Ohio's tax scheme seeks to impose income tax on a nonresident trust taxpayer's gains from selling its holdings in an Ohio pass-through company, which is *not* in a unitary business with the nonresident trust. Instead, the purported due process nexus with Ohio is based solely on the contacts between Ohio and a different taxpayer, the nonresident trust's grantor, evincing the absence of contacts between Ohio and the trust itself, which possessed full title and control over the stock following the transfer to the Trust.

For well over a century, this Court has acknowledged that "[n]o principle [has been] better settled than that the power of a state, even its power of taxation, in respect to property, is limited to such as is within its jurisdiction." *New York, L.E. & W.R. Co. v. Pennsylvania*, 153 U.S. 628, 646 (1894). And in the context of trust taxation, as here, this Court long ago held that a Virginia citizen's irrevocable transfer of corporate stocks and bonds to a Maryland trust could not, consistent with due process, be taxed by Virginia. *Safe Deposit Trust Co. of Baltimore v. Commonwealth of Virginia*, 280 U.S. 83, 92 (1929). This Court has since had occasion to confirm and refine these due process rules in the face of ever more voracious state tax schemes. None of those cases authorize the trust income tax scheme at issue here.

In the face of the Trust's constitutional challenge to Ohio's tax scheme, the Ohio Supreme Court did not cite, much less distinguish, *Allied-Signal*. Instead, reflective of the tax scheme's dubious legal underpinning, the Ohio Court relied upon this Court's 5-4 opinion in *Curry v. McCanless*, decided in 1939, which held that both Tennessee, the decedent's residence, and Alabama, where the trustee resided, each had the right to collect inheritance taxes on an estate probated in each state, administered by executors in each state, where the trust instrument permitted the decedent to receive income from the trust during her life, and to dispose of it at death. Thus, Tennessee could impose its inheritance tax on the Tennessee resident decedent's equitable title in the intangibles, while Alabama could impose its inheritance tax on the Alabama trust's legal title in the intangibles.

But *Curry* does not open the door for states like Ohio to tax nonresident trust taxpayers which possess the right to dispose of the trust's assets. Rather, here, as in *Safe Deposit* – specific jurisdiction to tax, *i.e.*, the nonresident taxpayer trust's requisite minimum contacts, cannot be premised upon (or aggregated with) a different taxpayer's contacts with the taxing state.

In relying upon *Curry*, and in eschewing *Allied-Signal*, the Ohio Court simply applied the wrong rule (improperly applying general jurisdiction rules to a nonresident, rather than the pertinent specific jurisdiction rules), rendering an opinion wholly incompatible with this Court's controlling decisions. If left undisturbed, it will, similar to California's tax scheme at issue in *Hunt-Wesson, Inc. v. Franchise Tax Bd. of Cal.*, 528 U.S. 458 (2000), provide a vehicle for states to evade due process restraints on the jurisdictional reach of state laws, and particularly state tax laws.

Left unchecked, the decision below will erode this Court's due process jurisprudence, particularly in the income tax context, demanding *both* jurisdiction to subject the taxpayer to tax (the holding in *Quill Corp. v. North Dakota*, 504 U.S 298 (1992)) (requiring the trust to purposefully avail itself of the benefits of an economic market in Ohio), *and* jurisdiction to tax the transaction at issue (the holding in *Allied-Signal*) (requiring proof of a unitary business between the trust and the Ohio corporation whose stock it sold).

Review is thus warranted here. Moreover, given the Ohio Court's failure to adhere to this Court's holdings in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011), *Quill*, *Allied-Signal*, and *Safe Deposit*, this Court should grant review, vacate the Ohio Court's opinion, and remand in light of those controlling precedents.

STATEMENT OF THE CASE

A. The Trust Is A Delaware Resident Trust And Had No Ohio Qualifying Beneficiaries During The Relevant Time Period.

The facts of this case are not in dispute.[3] The Trust was formed in 2005 under the T. Ryan Legg Irrevocable Family Trust Agreement (the "Trust Agreement") as a Delaware resident trust pursuant to Del. Code Ann. Tit. 30 § 1601(8). The Trust is governed by Delaware law. App. at 3a. Under the Trust Agreement, the Trustee has always been a Delaware trustee.[4]

The Trust had no beneficiaries in Ohio in 2005 or 2006, the relevant tax years for this appeal. App. at

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[3] The only facts included are those pertinent to whether or not Ohio may subject the Trust to an income tax on its gain from the sale of stock consistent with due process.

[4] The Trust Agreement initially named the U.S. Trust Company of Delaware ("U.S. Trust") as Trustee, which served as Trustee from 2005 to 2008. Charles Schwab Bank served as Trustee from 2008 to 2009, UBS Trust Company, N.A. ("UBS Trust") served as Trustee from 2009 until 2015 when UBS Trust was merged into Reliance Trust Company of Delaware, a Limited Purpose Trust ("Reliance Trust"), which then became the Trustee. App. at 10a.

24a. The Trust Agreement required that the Trust not make any distributions during the "Initial Period", November 14, 2005 through January 3, 2007; during this time, the Trustee was to accumulate net income and add it to principal. App. at 25a.

B. Legg Co-Founded Total Quality Logistics In 1997, Withdrew From That Business In 2005, And Later That Year Transferred A Portion Of His Stock To The Trust.

Thomas Ryan Legg ("Legg") was a resident of Ohio in 2005 and 2006.[5] App. at 2a. In 1997, he co-founded a trucking logistics business with Ken Oaks, Total Quality Logistics, Inc. ("Logistics"), incorporated in Ohio. App. at 2a. Legg and Oaks each owned 50 percent of the company's shares. For tax purposes, Logistics was a Subchapter S corporation. App. at 1d.

In 2005, Legg withdrew from and quit participating in Logistics business. App. at 2a. Later that year, Legg transferred his half of the Logistics shares into

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[5] Legg was a native of West Virginia who moved to Ft. Thomas, Kentucky in 1997. He moved to Cincinnati, Ohio in 2001, and lived there for approximately 5 years, until mid-2006, when he moved back to West Virginia. Legg moved to North Carolina shortly thereafter, where he and his family now reside.

two trusts; 65 shares were transferred into the Trust. App. at 3a.

C. The Trust, Which Was Not Engaged In Logistics' Business, Sold The Logistics Shares In 2006, Resulting In A Gain.

The Trust was "not itself engaged in the corporate business" of Logistics. App. at 17a.

On December 2, 2005, the Trust entered into a purchase agreement with Oaks to sell him its 65 shares. This sale ultimately closed in February 2006, generating a capital gain of $18,614,242. App. at 3a.

D. Ohio's Trust Income Tax Scheme Seeks To Tax A Nonresident Trust's Gain On The Sale Of Its Interest In A Pass-Through Entity.

Ohio imposes its income tax on a nonresident trust's gain on the sale of an ownership interest in a company taxed as a pass-through, based on the Ohio percentage of that company's assets. OHIO REV. CODE 5747.02(A)(1); OHIO REV. CODE 5747.01(BB)(4)(b). The tax is imposed regardless of any assertion of personal jurisdiction over the non-resident trust.

Ohio imposes its income tax on trusts on their modified Ohio taxable income. OHIO REV. CODE 5747.02(A)(1). "Modified Ohio taxable income" is the sum of a trust's modified business income, qualifying trust amounts, and modified nonbusiness income. OHIO REV. CODE 5747.01(BB)(4)(a) through (c). A "qualifying trust amount" is "capital gains and losses from the sale, exchange, or other disposition of equity or ownership interests in … a qualifying investee to the extent included in the trust's Ohio taxable income." OHIO REV. CODE 5747.01(BB)(2). App. at 18a.

A "qualifying investee" includes "a person in which a trust has an equity or ownership interest" but not generally a C corporation, provided that the trust's investment equates to at least 5% of the total ownership interest. OHIO REV. CODE 5747.01(BB)(2)(b); OHIO REV. CODE 5747.011(B); OHIO REV. CODE 5747.01(BB)(5). App. at 13a.

Also, the "book value of the qualifying investee's physical assets in this state and everywhere, as of the last day of the qualifying investee's fiscal or calendar year ending immediately prior to the date on which the trust recognizes the gain or loss" must be "available to the trust." OHIO REV. CODE 5747.01(BB)(2)(a). App. at 13a.

Such asset book value and location information of a qualified investee is, as a practical matter, *always available* to a trust because a "pass-through shareholder enjoys the statutory right to access corporate information." App. at 17a. Availability is not dependent on whether the trust and the company are engaged in a unitary business.

The net result of Ohio's trust income tax scheme is that if a nonresident trust sells an ownership interest in a company taxed as a pass-through, *e.g.*, an S corporation, with assets in Ohio, Ohio will subject a portion of the gain, based on the proportion of the net book value of the company's assets in Ohio versus everywhere, to Ohio trust income tax. OHIO REV. CODE 5747.02(A)(1); OHIO REV. CODE 5747.01(BB)(4)(b).

E. Ohio Assessed The Trust For Trust Income Tax On The Trust's Gain On Its 2006 Sale Of Its Logistics Stock, And The Ohio Board Of Tax Appeals Upheld The Assessment.

On its 2006 Ohio income tax return, IT-1041, the Trust took the position that no tax was due to Ohio on the capital gain, *i.e.*, that the gain should be allocated outside of Ohio.

On May 26, 2009, the Ohio Department of Taxation ("Department") issued a notice of assessment to the Trust for $1,275,597 in unpaid taxes, plus interest and penalties. The Trust timely petitioned for reassessment, alleging, *inter alia*, that the Department's position violated the Due Process Clause of the United States Constitution. App. 4a. On March 29, 2013, the Tax Commissioner issued his Final Determination upholding the assessment of tax and interest on the basis that the gain was a qualifying trust amount, all of which was allocable to Ohio. App. at 4a.

The Trust timely appealed the Final Determination to the Ohio Board of Tax Appeals ("Board") on May 28, 2013, alleging, among other things, that the Tax Commissioner's Final Determination violated the Due Process Clause of the United States Constitution. After a hearing, the Board issued its Decision and Order on May 5, 2015 upholding the Final Determination and noting: "[w]ith regard to appellant's constitutional claims, we make no finding in relation thereto. Although the Ohio Supreme Court has authorized this board to accept evidence on constitutional points, it has clearly stated that we have no jurisdiction to decide constitutional claims." App. 50a.

F. The Ohio Supreme Court Applied The Due Process Rule In *Curry v. McCanless,* Rather Than The *Allied-Signal* Rule.

On June 5, 2015, the Trust timely appealed to the Ohio Supreme Court, reiterating its position that among other things, the Final Determination violated the Due Process Clause of the United States Constitution. App. 1a.

The Ohio Supreme Court heard oral argument on August 31, 2016, and on December 28, 2016 issued its opinion affirming the Board's Decision and Order in part, reversing it in part, and remanding for proper determination of Ohio's allocation of the capital gain. App. 2a.

The Ohio Court determined that the capital gain from the Trust's sale of Logistics stock was a qualifying trust amount on which the Trust must pay Ohio income tax based on the proportion of Logistics net book value in Ohio versus everywhere in 2005, which was approximately 80%. App. 21a.

The Ohio Court also concluded that the Trust was a nonresident trust and should be taxed as such. App. 26a.

As to the Trust's due process arguments, the Ohio Court distinguished the Trust's appeal from its recent decision in *Corrigan v. Testa*, 149 Ohio St.3d 18, 2016-Ohio-2805, 73 N.E.3d 381 (Ohio 2016) focusing on *Legg's* contacts with Ohio, rather than those of the nonresident taxpayer Trust. *Corrigan* involved Ohio's attempt to impose income tax on a nonresident individual who realized a capital gain when he sold his interests in a pass-through entity that did business in Ohio. Citing, *inter alia*, *Allied-Signal* and *Meadwestvaco Corp. v. Illinois Dep't of Revenue, 553 U.S 16 (2008)*, the Ohio Court determined that Ohio's attempt to tax the nonresident individual's capital gain violated due process in the absence of a unitary business between the nonresident individual owner and the in-state pass-through entity.

Here, instead of relying on *Allied-Signal* and *MeadWestvaco*, the Ohio Supreme Court applied *Curry v. McCanless*, 307 U.S. 357 (1939). App. at 28a. *Curry v. McCanless* involved an issue of whether two states could, consistent with due process, each impose their respective inheritance taxes on the same intangibles to which a Tennessee resident decedent held equitable title and to which an Alabama resident trust held legal title. 307 U.S. at 369. This Court held that both states had jurisdiction to tax these same intangibles owned by their respective residents. *Id.* at 370, 372.

The Ohio Supreme Court, applying *Curry v. McCanless,* based its holding on Legg's connections with Ohio as opposed to the Trust's connections with Ohio:

> Properly analyzed, this case involves an Ohio resident [*i.e.*, Legg] who conducted business in significant part in Ohio through the corporate form and who disposed of his business and corporate interest not by a personal sale but by means of a trust that he created to accomplish his objectives for himself and his family. *Although Legg deliberately set up a Delaware trust, his Ohio contacts are still material for constitutional purposes.*

> In the context of upholding the imposition of inheritance taxes, the United States Supreme Court made a statement that is equally applicable to Legg and his trust in this case. Namely, *Legg's own "power to dispose of the intangibles*[6] was a potential source of wealth which was property in [his]

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[6] There were actually two separate dispositions of Logistics stock – one by Legg and another by the Trust. First, Legg disposed of the Logistics stock by contributing it to the Trust in November 2005. App. at 3a. Second, in December 2005, the Trust disposed of the Logistics stock by entering into a purchase agreement to sell the Trust's Logistics stock; then, in February 2006, the Trust sold the stock when the sale closed. App. at 3a. Ohio is actually imposing its income tax on the second disposition, the one effectuated by the Trust.

> hands from which [he] was under the highest obligation, in common with [his] fellow citizens of [Ohio], to contribute to the support of the government whose protection [he] enjoyed." *Curry v. McCanless*, 307 U.S. 357, 370–371, 59 S.Ct. 900, 83 L.Ed. 1339 (1939). Just as the inheritance taxes in *Curry* were not imposed on the deceased state resident herself, so too is the trust income tax not directly imposed on Legg—yet *his* [*i.e.*, Legg's] *own contacts with Ohio and with the business easily justify the imposition of the tax on the trust from the standpoint of due process*.

App. 28a-29a (footnote, [ ], and *emphasis* added).

In sum, the Ohio Court held that due process as to imposition of Ohio income tax on the Trust's sale of stock in 2006 was satisfied *not by any contact identified between the Trust and Ohio* but rather solely *by Legg's contacts with Ohio*.

Notably, the Ohio Court did not make any findings as to any connection between the Trust's gain on the sale of Logistics stock and Ohio, *i.e.*, the transaction Ohio seeks to tax, which would be required under *Allied-Signal, supra*. Nor did the Ohio Court make any findings as to any connection between the taxpayer it sought to tax – the nonresident Trust – and Ohio, as required under the specific jurisdiction due process rules.

The Trust argued that the case should be viewed in light of, *inter alia*, this Court's holding in *Allied-Signal, supra*. But, on March 15, 2017, the Ohio Court denied the Trust's timely Motion For Reconsideration.

REASONS FOR GRANTING THE WRIT

The Ohio Supreme Court's decision warrants review by this Court for three compelling reasons. First, the decision below cannot be read in accord with this Court's controlling due process precedent as to the requirements for and application of general and specific jurisdiction. Those cases demand that for a state to assert specific jurisdiction over a nonresident person, there must be a minimum connection between the taxing state *and both* the taxpayer *and* the transaction the state seeks to tax. Yet the decision below neither identifies nor asserts any connection between Ohio and the Trust and its sale of Logistics stock, instead predicating its holding on Ohio's connections to Legg alone. This cannot be squared with Fourteenth Amendment due process requirements.

Second, the decision below is an outlier among other state courts of last resort. Other state courts have long held that connections between a grantor and the state are not enough of a connection for a state to tax the trust. In fact, Ohio's decision appears to be the first of its kind. This Court should review whether Ohio's reading of the Due Process Clause is correct when it is in opposition to what other state courts have held for years. Moreover, Ohio's decision conflicts with its own precedent in a case it decided mere months before this one.

Third, this case has broad real-world significance. It is commonplace for individuals to create trusts in states like Delaware as a tax-efficient estate planning measure. The Ohio Court's decision effectively holds that Ohio residents, and states that follow Ohio's lead, will no longer receive Due Process Clause protection when creating out-of-state trusts. This starkly contrasts with residents of other states whose courts have correctly chosen to treat out-of-state trust taxpayers consistent with due process.

For these reasons, discussed in more detail herein, this Court should grant review.

I. THE OHIO SUPREME COURT'S DECISION CONFLICTS WITH THIS COURT'S SETTLED DUE PROCESS PRECEDENT.

A. Ohio Violated Due Process By Imposing Income Tax On The Nonresident Trust Absent The Requisite Minimum Contacts Between The State And *Both* The Nonresident Taxpayer *And* The Transaction.

Without the requisite minimum connections with *both* a taxpayer *and* the subject transaction, a state is powerless to exact a tax on a nonresident on a sale of stock. Accordingly, Ohio is powerless to exact an income tax on the Trust and the Trust's sale of its Logistics stock.

The Fourteenth Amendment's Due Process Clause is a key safeguard against extraterritorial taxation, circumscribing state authority to tax a nonresident's sale of stock. It is well-established that "[t]he personalty owned by a citizen out of the state is taxable where he resides…. So are the stocks he may hold in a foreign corporation." 2 *Cooley on Taxation*, (1st ed.) at 270. As this Court has long recognized, "[i]t is a venerable if trite observation that seizure of property by the State under the pretext of taxation when there is no jurisdiction or power to tax is simple confiscation and a denial of due process of law." *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 342 (1954).

A state's power to tax is concurrent with its jurisdiction.[7] In the tax context, as stated, this

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[7] In *Quill*, this Court acknowledged that the jurisprudence regarding a State's jurisdiction to tax "[b]uild[s] on the seminal case of *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154 (1945)…." *Quill Corp.*, 504 U.S. at 307. *See also Shaffer v. Heitner*, 433 U.S. 186, 212 (1977) ("We therefore conclude that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."). As this Court held, "the relevant inquiry [is] whether a defendant had minimum contacts with the jurisdiction 'such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" *Id.* (*quoting International Shoe*, 326 U.S. at 316). Under this Court's due process precedent, the test is "whether a defendant's

manifests in a requirement of "some definite link" or "minimum connection" between the state and both: the taxpayer and the transaction it seeks to tax. *Miller Bros*., 347 U.S. at 344-45. *See also MeadWestvaco*, 553 U.S. at 19 ("The Due Process … Clause[] forbid[s] the States to tax extraterritorial values.").

The Ohio Court held that due process was not offended based on *Legg's* contacts with Ohio, glossing

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contacts with the forum made it reasonable, in the context of our federal system of Government, to require it to defend the suit in that State." *Id*. In *Shaffer*, this Court held that nonresident officers in a Delaware company could not be haled into court in the state simply because of their ties to the company. While "it is appropriate for Delaware law to govern the obligation of [the officers] to [the company] and its stockholders," it was not enough to show that "appellants have purposely availed themselves of the privilege of conducting activities within the forum State." *Id*. at 216 (internal citation and quotation omitted). This Court went on to note that "it strains reason…to suggest that anyone buying securities in a corporation formed in Delaware impliedly consents to subject himself to Delaware's jurisdiction." *Id*. (internal citation and quotation omitted). Likewise, here, the Trust's mere ownership in an Ohio company and its sale of stock therein is not enough to permit Ohio to assert jurisdiction over the Trust or the gain, and Legg's connections to Ohio do not attach to the Trust.

over the absence of any contacts of the Trust with Ohio. While Legg was an Ohio resident at the relevant time, Legg is not the taxpayer and did not sell the Logistics stock that resulted in the gain; rather, the Trust is the taxpayer, and the Trust sold the stock. Accordingly, Legg's connections do not support Ohio's assessment of trust income tax on the Trust or on the Trust's gain on its sale of its Logistics stock in 2006.

As a prerequisite to tax, due process requires minimum contacts between the taxing state, here Ohio, and *both*: the nonresident, *i.e.*, the Trust (*Quill*) *and* the transaction sought to be taxed, *i.e.*, the Trust's sale of Logistics stock (*Allied-Signal*). The Ohio Court identified no connections between the Trust and Ohio, nor between the Trust's gain and Ohio. Accordingly, the Ohio Court's decision is wholly inconsistent with this Court's due process jurisprudence.

B. The Ohio Court Applied The Wrong Rule, *i.e.*, General Jurisdiction When It Relied On *Curry v. McCanless,* Which Permitted A State To Impose An Inheritance Tax On Its Resident's Intangibles.

The Ohio Supreme Court held that Legg's connections to Ohio were enough to justify Ohio's taxation of the gain. App. 29a. In so doing, the Ohio Court relied on *Curry v. McCanless*, 307 U.S. 357 (1939).

Curry held that it was constitutionally permissible for both Alabama and Tennessee to impose an inheritance tax on a Tennessee beneficiary decedent's testamentary transfer of stock held in trust by an Alabama trustee. *Id*. at 369. Certainly, as the *Curry* Court noted, the state of a trustee's domicile could always impose a tax on a trust's intangibles. *Id*. at 370. However, the decedent's state could also impose an inheritance tax on the intangibles given her "power to dispose of the intangibles" and "invo[cation] of the law" of that state in residing there. *Id*. at 370, 372.

Curry's holding is actually quite basic: a state has the power to tax its residents. In *Curry*, Alabama could tax the intangibles at issue because their legal owner, the trustee, was a resident there, and Tennessee could impose an inheritance tax on the intangibles because their equitable owner, the decedent, was a resident there. It is crucial to note, however, that Tennessee was able to impose a tax in *Curry* because it had imposed an inheritance tax. A state may impose an *inheritance tax* on a decedent who has died while domiciled in that state, and a state may impose an *income tax* on the accretion to a resident's wealth. Had Tennessee sought to impose an *income tax* against the Alabama trust's income in *Curry*, the inquiry would have required an investigation into the *trust's* contacts with that state, not those of the decedent grantor. The Ohio Court's decision below failed to recognize this critical, dispositive distinction. Certainly, Ohio may tax the income of its residents. The Trust, however, is not an Ohio resident.

The *Curry v. McCanless* rule is the tax-equivalent of the rule concerning a state's general jurisdiction over its residents. In this regard, as to due process generally, "A court may assert general jurisdiction over … sister-state … corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." *Goodyear*, 564 U.S. at 919. "In contrast to general, all-purpose jurisdiction, specific jurisdiction is confined to adjudication of 'issues deriving from, or connected with, the very controversy that establishes jurisdiction.'" *Id.* (citation omitted). Because the Trust is a nonresident, specific jurisdiction rules apply here.

Under *Goodyear*, the Trust cannot be subject to Ohio's general jurisdiction. Notably, in that case, respondents attempted to belatedly assert that North Carolina's jurisdiction over foreign subsidiaries could be predicated upon the state's connection to the parent corporation. But, this Court ultimately held that there had been no previous assertion of a unitary business between the two. *Id.* at 930. This is the virtual equivalent of the Ohio Court premising Ohio's connection to the Trust via Legg, and as in *Goodyear*, there has been no previous assertion of a unitary business between the Trust and either Legg or Logistics.

In short, this Court held that North Carolina could not assert general jurisdiction over foreign entities where "[t]heir attenuated connections to the State…fall far short of the 'continuous and systematic general business contacts' necessary to empower North Carolina to entertain suit against them on claims unrelated to anything that connects them to the State." *Id*. at 929 (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416, (1984). *See also Daimler AG v. Bauman*, 134 S.Ct. 746 (2014) (holding that a parent company may not be subjected to a state court's general jurisdiction based on the contacts of its in-state subsidiary).

Absent the requisite unitary business relationship between the Trust and Logistics (or even with Legg), Ohio cannot assert jurisdiction to tax the Trust given the lack of any continuous or systematic contacts between the Trust and Ohio. Simply put, the Ohio Court's decision conflicts with this Court's decision in *Goodyear*.

C. The Ohio Court Should Have Applied This Court's Controlling Specific Jurisdiction Precedent Demanding A Minimum Connection Between The State And *Both* The Taxpayer (*Quill*) *And* The Transaction Sought To Be Taxed (*Allied-Signal*).

The Ohio Court should have applied the specific jurisdiction due process requirements of minimum connections between Ohio and *both* the Trust (*Quill*) *and* the sale transaction (*Allied-Signal*).

Of course, the threshold question here is whether the Trust has the minimum connections with Ohio required by due process to authorize Ohio to impose a tax in the first place. The Trust submits that it does not, given that it is a nonresident with no identified connections with Ohio. Indeed, the Ohio Court identified *Legg's* connections—not the

Trust's—as those meeting the due process requirements. App. at 28a.

Only where an out-of-state entity "purposefully avails itself of the benefits of an economic market in the forum State, it may subject itself to the State's *in personam* jurisdiction even if it has no physical presence in the state." *Quill*, 504 U.S. at 307.

There is no finding (or claim) that the Trust had purposefully availed itself of the benefits of an economic market in Ohio. Indeed, the Trust's holding and sale of Logistics stock was not a business at all, much less one directed at Ohio. *City Bank Farmers Trust Co. v. Helvering*, 313 U.S. 121, 126 n.3 (1941).

Even if this Court were to find that the Trust *did* have some connection to Ohio, the analysis does not stop there, however. This Court must also evaluate whether Ohio had enough connection to the transaction at issue.

In *Allied-Signal,* this Court considered the due process limitations on state taxation of a nonresident seller, which had a presence in the taxing state,[8] of its stock in an in-state company. That case concerned New Jersey's attempt to tax a portion of Bendix Corporation's gain resulting from its sale of its 20.6% stock interest in ASARCO, a New Jersey Corporation. 504 U.S. at 773-74. This Court reviewed whether New Jersey could impose a tax on

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[8] Ohio has never identified an in-state presence of the Trust.

the apportionable share of this income. *Id.* at 774. While a state could "tax an apportioned sum of a [nonresident] corporation's multistate business if the business is unitary" it could not do so if it is "'derive[d] from unrelated business activity which constitutes a discrete business enterprise.'" *Id.* at 772-73 (citing *ASARCO Inc. v. Idaho Tax Comm'n*, 458 U.S. 307, 317, 102 S.Ct. 3103, 3109 (1982) and quoting *Exxon Corp. v. Dep't of Revenue of Wisconsin*, 447 U.S. 207, 224, 100 S.Ct. 2109, 2120 (1980) (other internal quotations omitted)). In other words, the unitary business principle must be satisfied before a state may tax the multistate income of a nonresident entity.

In order to constitute a unitary business, three factors must be present: (1) functional integration; (2) centralization of management; and (3) economies of scale. *Id.* at 781 (*citing F.W. Woolworth Co. v. Taxation and Revenue Dept. of New Mexico*, 458 U.S. 354, 362, 102 S.Ct. 3128, 3135 (1982). As this Court explained:

> The unitary business rule is a recognition of two imperatives: the States' wide authority to devise formulae for an accurate assessment of a corporation's intrastate value or income; and the necessary limit on the States' authority to tax value or income that cannot in fairness be attributed to the *taxpayer's* activities within the State.

Id. at 780 (emphasis added). The focus is on the taxpayer's activities in the taxing State, not that of an entity in which the taxpayer has invested or any other actor.

Indeed, this Court acknowledged that when the business activities of the corporation in which the stock is sold "have nothing to do with the activities of the recipient in the taxing State, *due process considerations might well preclude apportionability*, because there would be no underlying unitary business." *Id*. The Trust submits that this is the case here.

Despite the Trust's urging, neither the Ohio Board of Tax Appeals nor the Ohio Supreme Court addressed the unitary business principle nor *Allied-Signal* more generally. Indeed, the Trust exercised no control over Logistics' business, and this Court has held that "[a] trustee's activities…[of] selling securities…[was] passive investment and not…carrying on a business…." *City Bank Farmers Trust Co.*, 313 U.S. at 126 n.3. There has been no assertion or finding of any unitary business relationship between the Trust and Logistics upon which to rest Ohio's jurisdiction to tax an out-of-state actor for value earned outside Ohio's borders. As such, Ohio's application of OHIO REV. CODE 5747.01(BB)(2) to the Trust to classify the involved gain as a qualifying trust amount results in Ohio taxing value outside of its borders contrary to *Allied-Signal*, and this Court's precedent.

Assuming *arguendo* that the requisite minimum connections between Ohio and the Trust are present, although they are clearly not, the issue then becomes one that is virtually indistinguishable from that in *Allied-Signal*, *i.e.*, whether Ohio can tax an apportionable part of the Trust's gain resulting from the sale of its 32.5% stock interest in Logistics, an Ohio-based multistate corporation. *Allied-Signal* stands for the proposition that even if there are connections between the taxpayer and the state, there must also be a link between the transaction and the state. Here, there is no connection between a nonresident Trust's sale of stock and Ohio. The connection between Ohio and the sale of Logistics stock by the nonresident Trust is too attenuated to sustain Ohio's jurisdiction to tax for due process purposes.

The Ohio Supreme Court's decision also conflicts with *Safe Deposit & Trust Co. of Baltimore, Md. v. Virginia*, 280 U.S. 83 (1929). This Court held that a trust estate consisting of intangibles transferred and delivered to a trust company in Maryland that were not under the control of the equitable owner was not subject to ad valorem tax in Virginia because "[a] statute of a state which undertakes to tax things wholly beyond her jurisdiction or control conflicts with the Fourteenth Amendment." *Id.* at 92. The Court noted that "the possessor of the legal title holds the securities in Maryland, thus giving them a permanent situs for lawful taxation there, and no person in Virginia has present right to their enjoyment or power to remove them…." *Id.* Thus, Virginia had no right to tax those out of state values because "[i]ntangible personal property may acquire a taxable situs where permanently located, employed and protected." *Id.* This Court took care to distinguish the facts of *Safe Deposit & Trust* from other cases in which the equitable owner retained control of the intangibles. *Id*. at 94.

Here, the Trust, a Delaware resident, took control over the intangible stock in Logistics in November 2005. It alone made the decision to sell the stock in December 2005 to Ken Oaks without Legg's permission or direction (and indeed, without the requirement to seek it, under the terms of the Trust Agreement), and the sale closed in 2006.

Yet, the Ohio Court held that Legg's connections to Ohio were alone enough to justify Ohio's taxation of the gain. App. 28a. To do so, the Ohio Supreme Court relied upon *Curry v. McCanless*.

Curry v. McCanless held that Alabama, the state in which the trustee resided, could impose an inheritance tax on the intangibles in which the trustee held legal title, and that Tennessee, the decedent's state of residence, could impose an inheritance tax on the intangibles in which the decedent had equitable title. *Curry*, 307 U.S. at 369. In contrast, in *Safe Deposit & Trust* the resident *inter vivos* grantor decedent had no present right to control, possess, or receive income from the intangibles in the context of an ad valorem tax, and the trust therein was not subject to tax in the state of the grantor decedent's residence. *Safe Deposit & Trust*, 280 U.S. at 94.

Here, Legg – like the grantor in the *Safe Deposit & Trust* case – had no present right to control, possess, or receive income from the Logistics stock in 2006, the tax year in which the Trust consummated the sale of Logistics stock and recognized the involved gain.

The Ohio Court should have applied this Court's holding in *Safe Deposit & Trust* (applying specific jurisdiction rules) – not the holding in *Curry* (applying general jurisdiction rules).

The Ohio Court's decision in this case is not simply on shaky constitutional ground. The court's reasoning is flatly incorrect and creates precedent for subsequent cases that will foster uncertainty in this settled area of the law. This Court recently noted "the danger" of holding that "specific jurisdiction is present without identifying any adequate link between the State and the nonresident[]." *Bristol-Meyers Squibb Co. v. Superior Court of California, San Francisco Cnty*., 137 S.Ct. 1773, 1781 (2017). If allowed to stand, the decision below will stand as a stark departure from the Constitution and this Court's jurisprudence in the areas of due process and taxation. The Trust urges this Court to reconsider the merits of this case and prevent an injustice to it and future taxpayers.

II. THE OHIO SUPREME COURT'S DECISION CONFLICTS WITH DECISIONS OF OTHER STATE COURTS OF LAST RESORT.

The Ohio Supreme Court's decision is an outlier given its conflict with decisions of other state courts of last resort, and even conflicts with one of its own recent decisions.

A. Ohio's Decision Is The First Of Its Kind Among Sister State Decisions Interpreting A State's Power To Tax Trusts On Income From Their Sale of Stock.

In the context of trust taxation, most states (in sharp contrast with Ohio here) respect the legal structure of such entities and do not regard the trust, the trustee, the grantor, and the beneficiaries as interchangeable for due process purposes. For example, in *Mercantile-Safe Deposit & Trust Co. v. Murphy*, 15 N.Y.2d 579, 203 N.E.2d 490 (1964), New York's highest court held that subjecting a nonresident trustee of an *inter vivos* trust created in Maryland by a resident of New York on income accumulated thereunder after the death of the grantor would violate due process. Similarly, in this case, the nonresident Trust had accumulated income that Ohio sought to tax solely based on its connection with Legg. The Ohio Supreme Court's decision is thus in direct conflict with the New York Court of Appeals' decision.

Years later, the Tax Court of New Jersey reached a similar result in *Potter v. Taxation Div. Director*, 5 N.J. Tax 399 (1983) (holding unrelated to jurisdiction to tax superseded by statute on other grounds). The court held that "[t]he state in which a beneficiary is domiciled may tax trust income distributed to the beneficiary" and "[t]he fact that contingent beneficiaries are domiciled in New Jersey does not constitute sufficient contact to empower New Jersey to tax undistributed trust income where the contingent beneficiaries have no right to the undistributed income." *Id.* at 405. Legg, although an

Ohio resident, had no present right to the Trust's income, so Ohio did not have sufficient contacts with the Trust. Again, the Ohio court's decision flies in the face of other states' application of this Court's Due Process Clause jurisprudence.

Four years later, the Missouri Supreme Court held that the state of grantor's domicile did "not have a sufficient connection with the subject trusts to permit the imposition of a[n]… income tax under the Fourteenth Amendment." *In re Swift*, 727 S.W.2d 880, 882 (Mo. 1987). The Missouri Court noted that the trustees, the beneficiaries, the trust property, and the administration of the trust were all out of state, and thus, the income at issue was earned due to the trust's administration out of state. *Id.* Though the trusts' grantor was domiciled and died in Missouri, the court held that:

> An income tax is justified only when contemporary benefits and protections are provided to the subject property or entity during the relevant taxing period…. In this case, Missouri law is providing no present benefit or protection to the subject trusts, their beneficiaries, trustees, or property.

Id.

The Ohio Court's decision reaches the opposite conclusion and holds that because Legg had Ohio contacts at one time previously, Ohio had jurisdiction to tax the Trust. App. 289. But Ohio provided no "contemporary benefits or protections" to the Trust. The Ohio Court's reasoning conflicts with the decision in *In re Swift*.

This is not, however, an instance of each state going their own way, as other states do not take the reasoning in these cases lightly. In *Blue v. Department of Treasury*, 185 Mich.App. 406, 410 (1990), the Court of Appeals of Michigan held "[w]e choose to follow the cases in Missouri and New York restricting the state's power to impose tax on resident trusts where neither the trustee nor the trust property are within the state. We conclude that there is no ongoing protection or benefit to the trust." The *Blue* case held that the trust's contacts with the state were "illusory considering that the trust is registered and administered" in another state. *Id.* at 411. Ohio is truly an outlier in this realm given its disregard for the legal form of the Trust, its contacts, and the protections afforded to it by Delaware, not Ohio.

Nor is this an example of outdated precedent in need of constant revision. As recently as 2013, the Illinois Court of Appeals held that the contacts between Illinois and an out-of-state *inter vivos* trust were too attenuated to sustain the state's attempted income taxation of the trust. *Linn v. Dep't of Revenue*, 2 N.E.3d 1203 (Ill. App.4th 2013). In evaluating the type of trust at issue, the court in *Linn* noted that "[s]ince an *inter vivos* trust is not created by the probate of the decedent's will in a state court, its connection with the state has been described as more attenuated than a testamentary trust." *Id.* at 1209. The court continued: "an irrevocable *inter vivos* trust does not owe its existence to the laws and courts of the state of the grantor in the same way a testamentary trust does and thus does not have the same permanent tie." *Id*. at 1210.

The court in *Linn* held that Illinois could not tax the out-of-state *inter vivos* trust under due process, noting that its connections were not enough to give rise to personal jurisdiction over the trust in litigation. The court explained that for Illinois to hail the trust into the state, it would have to be connected through "the provisions of the trust instrument, the residence of the trustees, the residence of its beneficiaries, the location of the trust assets, and the location where the business of the trust is to be conducted." *Id*. at 1211.

As in *Linn*, this case addresses an *inter vivos trust* and its more attenuated connections to the state of Ohio as compared to a testamentary trust. And, as in *Linn*, none of the factors giving rise to jurisdiction over the Trust or the gain are present here. The trustee is located in Delaware, the Trust's assets are in Delaware, and the business of the Trust is conducted there. There were no qualifying beneficiaries during the time of the sale of Logistics stock, resident or otherwise. The provisions of the Trust instrument specify that it is to be governed by Delaware law. Ohio simply could not hail the Trust into court in that state absent any connection.

Perhaps most critically, the *Linn* court pointed out that "[d]efendants cite no cases finding a grantor's in-state residency is a sufficient connection for due process with an *inter vivos* trust." *Id*. at 1210.

The decision below thus stands alone, reaching this novel[9] result by applying the incorrect rule of law and by conducting scant analysis. Indeed by ignoring the separate legal status of the nonresident Trust taxpayer, and its utter absence of Ohio connection,

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9 Other cases that conflict with Ohio's decision below abound. *Hercules Inc. v. C.I.R.*, 575 N.W.2d 111 (Minn. 1998) (holding that Minnesota's apportionment of gain on a sale of a company's stock that was not sufficiently linked to a corporation's day-to-day operations would violate due process); *Hercules Inc. v. Comptroller of Treasury*, 351 Md. 101, 716 A.2d 276 (1998) (holding that capital gain realized by taxpayer on the sale of its stock in a partial subsidiary was not apportionable to Maryland for income taxation because taxation thereof would violate due process); *Hercules, Inc. v. Dep't of Revenue*, 324 Ill. App. 3d 329, 753 N.E.2d 418 (2001) (under due process, state could not tax income from corporation's sale of stock of jointly owned corporation to other co-owner); *Matter of Income Tax Protest of Griffin Television, Inc.*, 877 P.2d 588, 594 (Okla. 1994) (taxing gain from sale of subsidiaries, *i.e.*, "income which was not derived from a unitary operation…violat[es]…the Due Process Clause"); *Gen. Mills, Inc. v. Comm'r of Revenue*, 440 Mass. 154, 795 N.E.2d 552 (2003) (taxing parent on gain from sale of foreign subsidiary's stock would violate due process); *Bendix Corp. v. Dir., Div. of Taxation*, 130 N.J. 389, 614 A.2d 613 (1992) (remanded in light of *Allied-Signal*). Ohio's decision below is inconsistent with each of these opinions.

Ohio has effectively pierced the Trust's corporate veil without any findings to justify doing so. The ramifications for new and wide-reaching precedent conducted without precise analysis warrants review by this Court, especially given increasing uncertainty as to the constitutional taxation of out-of-state actors, both trusts and otherwise.[10]

B. Ohio's Decision Conflicts With Its Own Precedent.

The Ohio Court's reasoning cannot even be squared with one of its own recent decisions. The court below analyzed this case in light of its decision in *Corrigan v. Testa*, decided mere months before this one. In that case, Ohio imposed an income tax on capital gains by a nonresident investor on his sale of a pass-through entity doing business in Ohio. No. 2016-Ohio-2805, ¶ 36. The court held that such taxation violated the nonresident's due process rights given his attenuated contacts to the state. *Id*. *Corrigan* focused extensively on *Allied-Signal*, noting the lack of a unitary business relationship between the nonresident taxpayer and the entity in which he sold

[10] Scholars have recognized this uncertainty as well. *See, e.g.*, Jeffrey Schoenblum, *The Role of Federal Law in Private Wealth Transfer: Strange Bedfellows: The Federal Constitution, Out-of-State Nongrantor Accumulation Trusts, and the Complete Avoidance of State Income Taxation*, 67 VAND. L. REV. 1945 (2014).

stock, noting that there must be a connection to the activity at issue, not just the taxpayer. *Id.* at 25-27.

Yet here, the Ohio Court chose to brush aside not only the similarities between the taxpayer in *Corrigan* and the taxpayer here, *i.e.*, the Trust, but also this Court's sound precedent in *Allied-Signal*. Instead it focused on the connections of Legg to Ohio, although he was not the taxpayer. App. 28a. This precedent could open the door for Ohio and other states to impute a connection to any entity because of a related party's contacts to the state—a resident chief executive officer of an out-of-state corporation, perhaps. This Court should shut that door.

III. THIS CASE HAS BROAD REAL-WORLD SIGNIFICANCE AND AFFECTS MILLIONS OF TAXPAYERS.

As noted above, millions of individuals have created Delaware trusts.[11] Other states, including Nevada, have likewise eliminated state income taxes,[12] and trusts are increasingly created under their laws by individuals engaging in estate planning, seeking

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[11] *See* n. 1, *supra*.

[12] *See* Kristen McNamara, *States Want Your Trust*, WALL STREET JOURNAL, June 14, 2010, *available at*: http://www.law.harvard.edu/programs/corp_gov/MediaMentions/06-14-10-WSJ.pdf.

asset protection, and attempting to secure favorable tax treatment.[13]

As of early 2016, "[m]ore than 10 million U.S. households ha[d] a net worth of $1 million or more," representing "one in 11 households." Given the large number of such households, it is not just the very wealthy who are, or could be, using trusts.[14] And the confluence of such asset accumulation in a greater number of households, along with states making available laws favorable to trust creation, suggests that the issues presented here will arise with greater frequency if not checked.

The scenario presented here is thus not isolated, nor does it involve legal concerns unlikely to be repeated. Ohio is seeking to extend its tax jurisdiction over nonresident trusts in an attempt to grab additional sources of tax revenue, and other like-minded revenue hungry states can be expected to follow suit. Trustees of nonresident trusts can be expected to try

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[13] *See* Richard Rubin, *Wealthy New York Residents Escape Tax With Trusts In Nevada*, Bloomberg Bus. Wk., Dec. 18, 2013, republished and *available at*: http://www.businessweek.com/news/2013-12-18-wealthy-n-dot-y-dot-residents-escape-levy-with-trusts-in-Nevada-taxes.

[14] *See* Pledger, *supra* n. 2.

to block such overreaching and to defend the favorable tax treatment afforded by their home states. There is a palpable tension between them, and further conflicts and controversies are nearly inevitable unless this Court steps in now.

Given that due process standards are the same for tax disputes as for other types of disputes, states following Ohio's lead can be expected to extend their jurisdiction over out of state trusts that simply own stock in a company doing business in their State, essentially flaunting *International Shoe* and *Shaffer v. Heitner*. The due process concerns raised here demand this Court's immediate resolution, not only of this dispute, but to avert ongoing uncertainty and divergence in this critical area.

Absent this Court's intervention, such disputes are certain to be repeated, as Ohio and its like-minded sister states will continue to misapply principles of general jurisdiction to justify the constitutionally improper taxation of nonresident trusts. This Court can put an end to this and reiterate/reconfirm that the specific jurisdiction principles found in *Goodyear*, *Quill*, and *Allied-Signal* control the exercise of jurisdiction by a state such as Ohio over a nonresident trust such as the Trust.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted. Moreover, given the Ohio Supreme Court's failure to adhere to this Court's controlling precedent, this Court should grant review, vacate the Ohio Supreme Court's opinion, and remand in light of the holdings in *Goodyear*, *Quill*, *Allied-Signal*, and *Safe Deposit*.

Respectfully submitted,

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July 13, 2017

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APPENDIX

APPENDIX A — SLIP OPINION OF THE SUPREME COURT OF OHIO, DATED DECEMBER 28, 2016

SUPREME COURT OF OHIO

No. 2015-0917

T. RYAN LEGG IRREVOCABLE TRUST,

Appellant and Cross-Appellee,

v.

TESTA, TAX COMMR.,

Appellee and Cross-Appellant.

August 30, 2016, Submitted
December 28, 2016, Decided

FRENCH, J.

Appellant and cross-appellee, the T. Ryan Legg Irrevocable Trust (hereinafter, the "trust"), appeals a decision of the Board of Tax Appeals ("BTA") that affirmed a tax on the trust's 2006 income. The trust argues that the tax on its capital gains from the sale of its stock in an Ohio company is unlawful and unconstitutional. On cross-appeal, the tax commissioner contends that this court lacks jurisdiction because the trustee did not authorize the filing of the trust's appeal before the BTA or its petition for reassessment before the tax commissioner.

We reject at the outset the jurisdictional arguments raised in the tax commissioner's cross-appeal and affirm the BTA's denial of the commissioner's motion to dismiss. Turning next to the trust's appeal, we conclude that the trust's capital gain constituted a "qualifying trust amount" subject to Ohio income tax on an apportioned basis but that the trust had a legal basis for seeking a reduced Ohio allocation. We also conclude that the tax assessment did not violate the Due Process Clause of the United States Constitution or the Equal Protection Clauses of the United States and Ohio Constitutions. We therefore affirm in part the BTA's decision to uphold the assessment, and we vacate that decision in part and remand to the tax commissioner for a determination of the proper Ohio allocation.

Facts

1. The family trust

T. Ryan Legg, an Ohio resident in 2005 and 2006, co-founded Total Quality Logistics, Inc. ("Logistics"), a trucking-logistics business, in 1997. He owned the business with Ken Oaks. Legg and Oaks each held 50 percent of the company's shares, and for tax purposes, the corporation was a pass-through entity. *See* R.C. 5747.01(K) (referring to R.C. 5733.04(O), which defines "pass-through entity" as "a corporation that has made an election under subchapter S of Chapter 1 of Subtitle A of the Internal Revenue Code for its taxable year under that code").

In 2005, Legg withdrew from the business. In November 2005, Legg transferred his half of the Logistics shares into two trusts: 32.5 percent of the Logistics shares went into the T. Ryan Legg Irrevocable Trust, the appellant and taxpayer in this case, and 17.5 percent of the shares went into a different trust. On December 2, 2005, the trusts entered into a purchase agreement by which the shares Legg had granted to the trusts would be sold, in effect, to his former business partner Oaks.[1] Although the trusts and the purchase agreement are dated November 14, 2005, and December 2, 2005, respectively, the sale of the shares did not close until February 2006.

The trust agreement appointed a trustee under Delaware law, stated that it was controlled by Delaware law, and designated Legg and his family members as beneficiaries. During a specified "initial period," the trustee was required to retain the trust's income and add it to the trust assets. That period effectively extended from November 14, 2005, to January 3, 2007.

In February 2006, the trust closed on the purchase and transferred its shares. The sale generated capital gain of $18,614,242.

2. Procedural history

On May 26, 2009, the Ohio Department of Taxation issued a notice of assessment for $1,275,597 in unpaid taxes, plus interest and penalties, for a total amount due of $1,868,382. The department referred to the gain

1. The purchase agreement also provides for the sale of Legg's one-half interest in two other entities. But the gain from the sale of shares in Logistics is the only issue before us.

as "business income" but then proceeded to apply an apportionment method prescribed by R.C. 5747.212 that is proper for certain types of "modified nonbusiness income." *See* R.C. 5747.01(BB)(4)(c)(ii). Specifically, the department calculated an apportionment ratio for 2004, 2005, and 2006 based on Logistics's Ohio-based property, payroll, and sales; took the average for those three years; and apportioned 91.8307 percent of the trust's 2006 gain to Ohio.

The trust petitioned for reassessment. In his March 2013 final determination, the commissioner found that the trust was a nonresident under R.C. 5747.01(I)(3) and upheld the assessment on two grounds. First, the capital gain was subject to Ohio tax as a "qualifying trust amount" under R.C. 5747.01(BB)(2). Second, as an alternative, the commissioner held that the capital gain was properly apportioned to Ohio under a March 2006 amendment to the statutes that called for "modified nonbusiness income" to be apportioned pursuant to the requirements of R.C. 5747.212. *See* R.C. 5747.01(BB)(4)(c)(ii); 2006 Am.Sub.H.B. No. 530, 151 Ohio Laws, Part III, 5982, and Part IV, 6690-6691. The final determination upheld the assessment of tax and interest, but abated the late-payment penalty. As a result, the total amount assessed was reduced from $1,868,382 to $1,473,192.

The trust appealed to the BTA, which held a hearing in May 2014. Less than 48 hours before the hearing, the tax commissioner filed a motion to dismiss, arguing that the BTA lacked jurisdiction because the trust had not shown that the trustee had authorized the filing of the notice of appeal and the petition for reassessment.

The BTA issued its decision in May 2015. BTA No. 2013-1469, 2015 Ohio Tax LEXIS 2303, 2015 WL 2169402, *1 (May 5, 2015). The decision denied the tax commissioner's motion to dismiss. The BTA noted that then-trustee Charles Schwab Bank had submitted a notice to the commissioner declaring attorneys Mark Loyd and Kevin Ghassomian, along with their law firm, Greenebaum, Doll & McDonald, as the trust's representatives before the Department of Taxation. *Id.* The declaration was submitted to the commissioner in August 2008, prior to the assessment and petition for reassessment. *Id.* In 2009, UBS Trust became the trustee. *Id.* The BTA found that "the record, as a whole, * * * indicates that UBS, Mr. Legg as grantor/beneficiary of the trust, and counsel themselves, at all times, considered Greenebaum Doll & McDonald (and its successor Bingham Greenebaum Doll LLP) to be the authorized representative of the subject trust." *Id.*

On the merits, the BTA upheld the assessment based on several findings. The BTA found that the capital gain constituted a "qualifying trust amount" under the statutes but additionally determined that the gain constituted apportionable "business income." 2015 Ohio Tax LEXIS 2303, [WL] at *3-4. The BTA also determined that the trust was taxable as a resident trust. 2015 Ohio Tax LEXIS 2303, [WL] at *4.

The trust has appealed, and the tax commissioner has asserted a cross-appeal challenging the denial of his motion to dismiss. We reject the cross-appeal, and we affirm the decision of the BTA.

The Tax Commissioner Has Not Proved that the Trust's Counsel Lacked Authority to File the Tax Appeals

Because the cross-appeal presents a threshold question of jurisdiction, we consider it first. We note that the tax commissioner states two reasons why the BTA lacked jurisdiction to review his final determination: counsel did not have the authority to file the notice of appeal on behalf of the trustee and counsel did not have the authority to prosecute the petition for reassessment. We reject both arguments.

1. The commissioner has neither rebutted attorney Loyd's presumptive authority to file the BTA appeal nor shifted the burden to the trust

With respect to the notice of appeal to the BTA, we hold that the tax commissioner's cross-appeal must fail because the tax commissioner has not rebutted the presumption that the lawyer representing the trust possessed authority to file the appeal. Mark Loyd was and is an Ohio attorney who, using his Ohio attorney-registration number, signed the notice of appeal and submitted it on behalf of the trust. As a result, a very strong presumption arose that Loyd had the authority to appear on the trust's behalf and prosecute the appeal.

"When an attorney files an appeal, it is presumed he has the requisite authority to do so." *State ex rel. Gibbs v. Zeller*, 2d Dist. Montgomery No. 9170, 1985 Ohio App. LEXIS 5686, 1985 WL 7625, *1 (Jan. 24, 1985); *see also*

FIA Card Servs., N.A. v. Salmon, 180 Ohio App. 3d 548, 2009-Ohio-80, 906 N.E.2d 467, ¶ 13 (3d Dist.) ("'there is a presumption that a regularly admitted attorney has authority to represent the client for whom he appears'"), quoting *Minnesota v. Karp*, 84 Ohio App. 51, 53, 52 Ohio Law Abs. 513, 84 N.E.2d 76 (1st Dist.1948); *accord Hill v. Mendenhall*, 88 U.S. 453, 454, 22 L.Ed. 616 (1874) ("When an attorney of a court of record appears in an action for one of the parties, his authority, in the absence of any proof to the contrary, will be presumed").

This basic presumption applies with enhanced force in this case, given that attorney Loyd was one of two persons originally appointed to represent the trust before the tax department. His continuous representation extended all the way from that appointment in August 2008, through the filing of the reassessment petition and the appeal to the BTA, to presenting the oral argument in this appeal.

The tax commissioner's burden was to offer "substantial proof in the form of countervailing evidence that authority is lacking, in order to justify, on that ground, an order to strike" the notice of appeal. (Citations omitted.) *See Booth v. Fletcher*, 101 F.2d 676, 683 (D.C.Cir.1938). To shoulder this burden and rebut the presumption, the commissioner offered the affidavit of Assistant Attorney General David Ebersole, who affirmed the affidavit's contents in his live testimony before the BTA. The affidavit relates that during a telephone conversation with Bailey Roese, one of the trust's lawyers, in response to a suggestion that the current trustee was a party to the BTA case, Roese "identified Thomas Ryan Legg, *not* the trust itself, as 'the client' and the person who authorized her and Mark Loyd to represent the Legg Trust." (Emphasis sic.)

The tax commissioner characterizes this as an admission that the lawyers lacked authority from the trustee itself, but we reject that contention both because it is an offhand comment embedded in a conversation concerning other matters and because it simply does not constitute a denial that counsel had authority from the trust. We do not regard the affidavit testimony as satisfying the "substantial proof" burden.

In addition, the record contains evidence of counsel's authority in the form of a letter presented by the trust at the BTA hearing and marked as exhibit 23, along with an affidavit submitted in response to the motion to dismiss. These submissions put the issue to rest. The letter was written in response to the tax commissioner's eleventh-hour motion to dismiss and is signed by trust officers of the then-current trustee, UBS Trust Company. The letter expresses approval of counsel's actions on behalf of the trust and states that UBS "has also formally engaged [Loyd's law firm] to pursue the Tax Controversy, including the Appeal [to the BTA]." The affidavit was created after the BTA hearing and attached to the trust's memorandum opposing the motion to dismiss; it is sworn by a trust officer of UBS and, in essence, reiterates the content of the letter.

What the tax commissioner is essentially arguing is that no notice of appeal to the BTA could have been filed without (1) a specific act of authorization for that particular filing issued by the trustee to counsel before the filing was effected and (2) proof of that act at the demand of the opposing party, the tax commissioner himself. The tax commissioner further contends that we must infer that there was no such act on the ground that if there had been, the trust would have proved it.

The tax commissioner cites case law stating that the trustee must authorize action on behalf of the trust. The tax commissioner, however, offers no case law or any other authority supporting the premise that a highly specific act of authorization was necessary, given that counsel had clearly been engaged to handle the tax protest. We see no reason why a trustee cannot engage a lawyer, entrust the tax matter to the lawyer, and keep tabs on the progress of the litigation, without additionally being required to maintain a file of specific authorizations that may later be produced when a party-opponent chooses to make an issue of the authority possessed by the trust's lawyer.

We reject the commissioner's theory that merely because the commissioner raised this issue, the trust acquired the burden of making a specific proof of authorization that is satisfactory to the commissioner's counsel. The trust had no burden to do anything more than it in fact did. We hold that the notice of appeal to the BTA was validly filed and that it invoked the BTA's jurisdiction to review the final determination of the tax commissioner.

2. The petition for reassessment was also validly filed

The tax commissioner contends that even if the notice of appeal to the BTA were valid, the BTA would still have lacked jurisdiction because of the alleged invalidity of the reassessment petition. The petition was filed on or about July 20, 2009, identified the trust as taxpayer and the assessment being contested, and was signed by Mark A. Loyd on behalf of himself and Kevin R. Ghassomian.

To understand the tax commissioner's argument, it is necessary to look at the change of trustees and how that relates to the time that the petition was filed. The trust agreement named U.S. Trust Company of Delaware as trustee and also provided for the replacement of the trustee. Charles Schwab Bank succeeded U.S. Trust as trustee in January 2008. UBS Trust Company, N.A., succeeded Charles Schwab Bank as trustee on June 5, 2009, and UBS remained trustee at all relevant times thereafter.

The tax commissioner argues that because the trustee changed on June 5, 2009, and because the "address" on the July 20, 2009 petition for reassessment identified the address of the former trustee, Charles Schwab Bank, rather than the current trustee, UBS Trust Company, the petition does not reflect proper authorization by the new trustee. To this circumstance, the tax commissioner adds the inference that he draws from the telephone conversation attested to in Ebersole's affidavit.

We conclude that the petition was validly filed based on the record before us. In response to the initiation of the audit that led to the assessment and subsequent petition, the trust filed two "TBOR-1" forms correctly identifying the trust as taxpayer and Charles Schwab Bank as the then-current trustee. A "Senior Trust Officer" of that bank signed the forms, which appointed "Mark Loyd, Greenbaum Doll & McDonald PLLC" and "Kevin R. Ghassomian, Greenbaum Doll & McDonald PLLC" to "represent the taxpayer before the Department of Taxation," which expressly included the power to "file petitions or applications." The forms recite that they remain valid until one year after the date signed, that is, one year from August 28, 2008.

Thus, both Loyd and Ghassomian of the Greenebaum law firm had been duly appointed to represent the trust on forms prescribed by the tax department for that very purpose. The tax commissioner does not contest the validity of these forms, and there is no dispute that Charles Schwab Bank was the trustee at the time the forms were executed. On their face, the forms were valid for one year, and the reassessment petition was filed within that year.

Quite simply, Loyd and Ghassomian had uncontested authority to represent the trust conferred by the TBOR-1 forms and to file the petition for reassessment, and the erroneous address on the petition does not change that fact. The tax commissioner has pointed to no requirement in statute or rule that the current trustee's address be accurately reported on the petition, and it is significant that the statutes impose the tax on the trust itself, which therefore is the taxpayer, the assessed party, and the petitioner in the proceedings before the tax department. R.C. 5747.02(A) ("there is hereby levied [an income tax] on every * * * trust ** * residing in or earning or receiving income in this state * * *"). Loyd and Ghassomian were the duly appointed tax representatives of the trust under tax-department procedures, and they acted timely within the scope of that appointment when they filed the reassessment petition in July 2009.

We hold that these circumstances establish that the petition for reassessment was validly filed and that the absence of a specific act of authorization for the filing of the petition from the new trustee did not impair the ability of the trust's appointed tax representatives to act on behalf of the trust in contesting the tax assessment.

Because we conclude that the tax commissioner's cross-appeal has no merit, we proceed to consider the issues raised by the trust on appeal.

The Capital Gain at Issue Constitutes a "Qualifying Trust Amount" that Can Properly Be Allocated in Part to Ohio

In his final determination, the tax commissioner found that the gain at issue constitutes a "qualifying trust amount" that could be apportioned to Ohio. The BTA affirmed that finding, and on appeal the trust contests that basis for the assessment by arguing that relevant records were not "available," as the statute requires.

1. The gain constituted a "qualifying trust amount"

R.C. 5747.01(BB)(2)'s definition of "qualifying trust amount" includes capital gains realized "from the sale, exchange, or other disposition of equity or ownership interests in, or debt obligations of, a qualifying investee to the extent included in the trust's Ohio taxable income," but only if two conditions are satisfied. First, under R.C. 5747.01(BB)(2)(a), the "book value of the qualifying investee's physical assets in this state and everywhere, as of the last day of the qualifying investee's fiscal or calendar year ending immediately prior to the date on which the trust recognizes the gain or loss" must be "available to the trust." Second, under R.C. 5747.01(BB)(2)(b), the requirements of R.C. 5747.011 must be satisfied—most notably, the requirement that the trust's ownership interest be at least 5 percent of the total outstanding ownership interests "at any time during the ten-year period ending on the last day of the trust's taxable year in which the sale, exchange, or other disposition occurs," *see* R.C. 5747.011(B).

The trust does not dispute that Logistics constitutes a "qualifying investee" under R.C. 5747.01(BB)(5)(a), nor that the 5-percent-ownership criterion in R.C. 5747.011(B) is also satisfied. The only issue the trust raises on appeal with respect to the satisfaction of the requirements for deeming its capital gain a "qualifying trust amount" concerns the "availability" of the records of Logistics. Under R.C. 5747.01(BB)(6), "available" means that the "information is such that a person is able to learn of the information by the due date plus extensions, if any, for filing the return for the taxable year in which the trust recognizes the gain or loss."

The BTA found that "the record establishes that the book value of the [Logistics] assets was available to the trust, whether it was actually requested or not, as it was utilized by the trust's tax preparer." BTA No. 2013-1469, 2015 Ohio Tax LEXIS 2303, 2015 WL 2169402, at *3. The trust contends that although the information at issue may have been available to its accountant, who was also Logistics's accountant, that does not mean that the information was available to the trust itself. That is, the accountant had separate duties to each of his clients, and those duties precluded him from making Logistics information available to the trust.

Under the circumstances, and given the language of the "qualifying trust amount" provision, we find unpersuasive the trust's argument that the book value of Logistics's physical assets was unavailable to it. First, R.C. 5747.01(BB)(2)(a) establishes that the relevant information is the location of the physical assets of Logistics "as of the last day of [Logistics's] fiscal or calendar year ending immediately prior to the date on which the trust recognizes the gain." Since the purchase agreement for the Logistics shares closed in February 2006, the date for determining the physical-assets allocation preceded the closing; indeed, it would probably fall at the end of calendar year 2005. Because the allocation date falls before the shares were transferred, the trust would have been able to exercise its shareholder's right to access Logistics's corporate financial information pursuant to R.C. 1701.37(C). That section provides that "[a]ny shareholder" may make a "written demand stating the specific purpose thereof" and thereby examine "for any reasonable and proper purpose" various corporate documents, including "books and records of account."

The trust clearly would have had a "proper purpose" in accessing such information. On the one hand, the trust was a pass-through taxpayer with respect to its share of Logistics's corporate earnings during 2005. It is difficult to conceive of any valid objection a closely-held corporation could raise to a shareholder's examining information that directly bears on the shareholder's own pass-through income-tax liability. And the fact that passed-through business income of the corporation is ordinarily apportioned, in part, by a property factor that would encompass physical assets of the corporation, *see* R.C. 5747.21(B), citing R.C. 5733.05(B)(2), means that the shareholder as taxpayer to some degree accesses such information in preparing its returns in the ordinary course.

The purchase agreement itself underscores this point by directly addressing the issue of income-tax liability for calendar year 2005. At section 9, the purchase agreement provides that the buyer and seller will split the 2005 tax expense equally and, in relation to that liability, each will receive a distribution from Logistics amounting to its 50 percent share of a specified portion (42.5 percent) of the cash-basis taxable income of the corporation. And under the agreement, the buyer is to deliver that distribution in connection with the closing.

We are persuaded that in enacting the qualifying-trust-amount provision, the legislature thought that the provision would ordinarily apply to a trust that is a pass-through shareholder of a closely-held corporation, precisely because such a trust, as that type of shareholder, would usually have access to the relevant corporate information in the course of complying with its own tax obligations.

Finally, the statute does not on its face preclude a taxpayer from asserting that it failed to obtain or retain information that was once available to it and that when it later requested the information, it was refused. Notably, the trust makes no such claim here.

Nevertheless, the trust argues that the purchase agreement prevented it from accessing the relevant information. The only provision of that agreement relevant to this point is Section 2, which grants the trust as seller the right to access Logistics's books upon the occurrence of a "monetization event"—i.e., one of the events enumerated in the agreement that might require a price adjustment. Because the evidence showed that no monetization event occurred, the trust concludes that the purchase agreement permitted no right of access. We disagree.

Section 2.5 of the purchase agreement states that the buyer "shall provide to Seller the right and opportunity for Seller and Seller's advisors to review * * * the books and records of [Logistics] to the extent necessary to determine whether a Monetization Event has occurred and the consideration to which Seller is entitled as a result of the Monetization Event." Under Section 2, a monetization event is an event that occurs *after closing* that may entitle the seller to receive additional compensation for the sale of its shares. Nothing in that provision purports to address the right of the trust to access *pre-closing* information that relates to its tax liabilities. And as discussed, it is that information that would include the information relevant to the physical-assets allocation of the gain as a "qualifying trust amount." We reject the trust's invitation to read an implied prohibition of access into Section 2, which relates to matters that occur after closing.

The trust also cites *Alcan Aluminum Corp. v. Limbach*, 42 Ohio St.3d 121, 537 N.E.2d 1302 (1989), but we conclude that the case does not support the trust's position in this appeal. In that case, we construed the term "available" in a different but analogous statute and held that physical-asset-location information could properly be found to be "available" to a taxpayer that was a 50 percent shareholder of the subsidiary corporation. The trust argues that because it owned only 35 percent of Logistics and was not itself engaged in the business of Logistics, it did not have the same right of access to Logistics's asset information. But we do not think that *Alcan Aluminum* militates against finding that Logistics's physical-asset information was available here. Although the trust owns a smaller percentage of corporate shares and is not itself engaged in the corporate business, it nonetheless qualifies as a pass-through shareholder for Logistics, bears the income-tax consequences of the operation of the business, and enjoys the statutory right to access corporate information. For the reasons already discussed, this circumstance supports the BTA's finding that the physical-asset information was "available" to the trust.

We conclude that the allocation information was "available" to the trust and that the gain at issue therefore constituted a "qualifying trust amount."

2. Because the income is a "qualifying trust amount," it is neither "modified business income" nor "modified nonbusiness income"

The trust next argues that the capital gain at issue should be allocated outside Ohio as "modified nonbusiness income," not "modified business income." However, because we have affirmed the finding that the income is a "qualifying trust amount," the distinction between business and nonbusiness income is moot.

Ohio taxes trusts on their "modified Ohio taxable income." R.C. 5747.02(A)(1). The modified Ohio taxable income is the sum of the trust's Ohio-apportioned or -allocated share of "modified business income," "qualifying investment income," and the "qualifying trust amount," along with the entire amount of a resident trust's "modified nonbusiness income." R.C. 5747.01(BB)(4)(a) to (c). R.C. 5747.01(BB)(1) in turn defines "modified business income" as "the business income included in a trust's Ohio taxable income after such taxable income is first reduced by the qualifying trust amount, if any." The statute therefore specifically excludes the qualifying trust amount from treatment as modified business income. Additionally, R.C. 5747.01(BB)(3) defines "modified nonbusiness income" as income "other than modified business income" and "other than the qualifying trust amount." It follows that the underlying distinction between business income and nonbusiness income is not relevant once the income in question has been determined to be a "qualifying trust amount," because, as such, that income is expressly excluded from the other categories of income for purposes of trust income taxation. We hold that because the trust's income is a "qualifying trust amount," it was neither "modified business income" nor "modified nonbusiness income."

We therefore hold that the BTA erred by considering whether the gain at issue was business or nonbusiness income. After upholding the commissioner's finding that the gain was a "qualifying trust amount," the BTA proceeded to consider the status of the income in relation to the distinction between business income and nonbusiness income under R.C. 5747.01(B) and (C). That was error because once the BTA affirmed the tax commissioner's determination that the gain was a "qualifying trust amount," that fact alone precluded the gain from being treated as "modified business income" or as "modified nonbusiness income" under R.C. 5747.01(BB).

Under these circumstances, we vacate the BTA's finding that the gain at issue constituted "business income" under R.C. 5747.01(B).

3. Because the state used the wrong method of allocating the gain to Ohio, the cause will be remanded

The trust argues that to the extent that the income is a qualifying trust amount, the "income cannot be attributable 100% to Ohio." That assertion embodies an error concerning the allocation method used by the tax commissioner; he did not allocate the gain from the sale of Logistics shares 100 percent to Ohio. Instead, the commissioner averaged the business-income apportionment factors for three years and, based on that average, apportioned 91.8307 percent to Ohio.

Despite the factual error within the trust's assertion, however, we agree that the trust has a legal basis for seeking a reduced Ohio allocation. Because the income constitutes a "qualifying trust amount," R.C. 5747.01(BB) prescribes not an apportionment based on the average of three years of Logistics's business-income factor, but rather an allocation based on the Ohio share of Logistics's physical assets as of the "last day of [Logistics's] fiscal or calendar year ending immediately prior to the date on which the trust recognizes the qualifying trust amount." R.C. 5747.01(BB)(4)(b).

Moreover, contrary to the tax commissioner's argument, the statute does not authorize an alternative allocation method for the "qualifying trust amount." The commissioner relies on a passage contained in R.C. 5747.01(BB)(4), which reads as follows:

> If the allocation and apportionment of a trust's income *under divisions (BB)(4)(a) and (c) of this section* do not fairly represent the modified Ohio taxable income of the trust in this state, the alternative methods described in division (C) of section 5747.21 of the Revised Code may be applied in the manner and to the same extent provided in that section.

(Emphasis added.) R.C. 5747.01(BB)(4)(c)(ii). The quoted passage explicitly authorizes alternatives for allocating *all the other types of trust income* (divisions (4)(a) and (4)(c)), and by doing so clearly implies the *absence of such authority for division (4)(b)*, which is the provision addressing the taxation of a "qualifying trust amount."

The foregoing discussion shows that the trust would be entitled to a reduced Ohio allocation if the physical-asset allocation were less than 91.8307 percent. Indeed, the record indicates the possibility of a physical-assets ratio less than that percentage. Namely, the property factor for tax year 2005, which would presumably include physical assets as of the end of the antecedent tax year, was 80.5094 percent.

The tax commissioner argues that we lack jurisdiction to review and remand this issue because the trust's only argument before the BTA on this point was that its income should be allocated 100 percent outside Ohio. The tax commissioner couches the argument as a waiver of any other alternative apportionment ratio. However, the trust's notice of appeal to the BTA asserted that "even under [the tax commissioner's] own position," i.e., that the gain was a qualifying trust amount, the commissioner's apportionment under R.C. 5747.01(BB)(4)(b) was "erroneously overstated" and that the trust was seeking a reduced apportionment as a "fraction" that was "something less than 100%" based on the book value of Logistics's physical assets in Ohio. The trust's notice of appeal therefore stated the error with sufficient specificity to invoke the BTA's and this court's jurisdiction. *See MCI Telecommunications Corp. v. Limbach*, 68 Ohio St. 3d 195, 1994 Ohio 489, 625 N.E.2d 597 (1994) (declining to deny review based on a "hypertechnical reading" of the notice of appeal), citing *Buckeye Internatl., Inc. v. Limbach*, 64 Ohio St.3d 264, 268, 1992 Ohio 55, 595 N.E.2d 347 (1992).

Under these circumstances, we must remand to the tax commissioner for a determination of the proper allocation to Ohio based on the applicable legal standard, as clarified above.

The Assessment Violates Neither Due Process nor Equal Protection

To the extent that the statutes permit the assessment, the trust argues that the assessment is unconstitutional as violating its rights to both due process and equal protection. As for due process, the trust argues that the income and the taxpayer lack sufficient connection with Ohio to permit the imposition of the tax. As for equal protection, the trust points to the different treatment accorded to a nonresident trust based on whether it owns S-corporation shares or C-corporation shares.

Before considering the constitutional points, however, we address the BTA's finding that the subject trust should be taxed as a resident trust. This issue has bearing on the trust's and its income's contacts with Ohio for due-process purposes. Additionally, the tax commissioner's contrary finding that the trust is a nonresident is the predicate for the equal-protection issue raised by the trust.

1. *The BTA's finding of trust residency contravenes the tax commissioner's determination, is facially defective, and must therefore be vacated*

The tax commissioner's final determination stated that the trust was a nonresident trust pursuant to R.C. 5747.01(I)(3). The commissioner specifically proceeded on that premise when considering, as an alternative to his finding that the income was a "qualifying trust amount," the proper treatment of the income as "modified nonbusiness income." Thus, the tax commissioner relied on a finding favorable to the trust: that the trust was a nonresident. For obvious reasons, the trust did not contest this finding, nor did the tax commissioner change his position before the BTA.

Yet the BTA made a contrary finding in its decision. BTA No. 2013-1469, 2015 Ohio Tax LEXIS 2303, 2015 WL 2169402, at *4. Under R.C. 5747.01(I)(3)(a), the residency of a trust depends on whether the assets were transferred into the trust by an Ohio domiciliary/resident and whether a "qualifying beneficiary" is an Ohio resident. The BTA found that Legg was an Ohio resident at the relevant times and that he was also a beneficiary of the trust in 2006; that sufficed, according to the BTA, to support the conclusion that the trust was a resident trust.

But the trust has pointed out that the BTA's analysis skips one crucial element necessary for a finding of resident status. The BTA ignored the requirement that the resident beneficiary be a *qualifying* beneficiary, meaning that the beneficiary had to be a "potential current beneficiary" under Internal Revenue Code 1361(e)(2), R.C. 5747.01(I)(3)(c). We agree with the trust on that point.

The federal provision states:

> For purposes of this section, the term "potential current beneficiary" means, with respect to any period, any person who at any time during such period is entitled to, or at the discretion of any person may receive, a distribution from the principal or income of the trust (determined without regard to any power of appointment to the extent such power remains unexercised at the end of such period). If a trust disposes of all of the stock which it holds in an S corporation, then, with respect to such corporation, the term "potential current beneficiary" does not include any person who first met the requirements of the preceding sentence during the 1-year period ending on the date of such disposition.

26 U.S.C. 361(e)(2).

The BTA correctly found that Legg was an Ohio resident when he transferred the Logistics shares to the trust, and he was an Ohio resident and a beneficiary during 2006. But the BTA failed to consider the additional requirement that some person qualify as a "potential current beneficiary." This would require the trust terms to have permitted a distribution to a beneficiary during 2006, which under the trust terms was part of the "initial period." At the BTA and again before this court, the trust points to section 2.1(a)(1) of the trust agreement, which required the trustee to accumulate income during the initial period, that is, during all of 2006. The tax commissioner's brief argued in support of the BTA's residency finding without responding to the trust on this point.

At oral argument before us, the tax commissioner's counsel pointed to two trust provisions that purportedly permitted distributions during 2006: section 3.1(n), which confers upon the trustee the power to "make any distribution or division of trust property in cash or in kind or both, at any time and from time to time," and section 2.1(c)(ii), which speaks of "mak[ing] all principal distributions" to the grantor or other beneficiaries, with the timing of these discretionary acts being "before the initial funding of the Family Trust or thereafter at any time prior to the termination of the Family Trust." We decline to accept, however, the tax commissioner's belated arguments on this point, submitted for the first time at oral argument and never properly briefed or considered below.

Moreover, we confront a BTA finding contrary to the tax commissioner's final determination that the trust was a nonresident. Absent a finding that the tax commissioner's conclusion was "clearly unreasonable or unlawful," the findings in the final determination are "presumptively valid." *See Hatchadorian v. Lindley*, 21 Ohio St.3d 66, 21 Ohio B. 365, 488 N.E.2d 145 (1986), paragraph one of the syllabus. *See also Alcan Aluminum*, 42 Ohio St.3d at 123, 537 N.E.2d 1302 ("it is error for the BTA to reverse the commissioner's determination when no competent and probative evidence is presented to show that the commissioner's determination is factually incorrect").

We therefore conclude that the trust should be taxed as a nonresident trust and that the tax commissioner's original determination of the trust's residency was presumptively valid. Accordingly, we must vacate the BTA's residency finding, with the result that the tax commissioner's finding that the trust is a nonresident is reinstated as the basis on which we decide this appeal.

2. The assessment does not violate the trust's due-process rights

The Due Process Clause of the Fourteenth Amendment guards against a state's exceeding its jurisdiction to tax by establishing a twofold test. First, there must be a definite link or a minimum connection between the state and the person, property or transaction that Ohio seeks to tax; second, the income attributed to the state for tax purposes must rationally relate to values connected with the taxing state. *Hillenmeyer v. Cleveland Bd. of Review*, 144 Ohio St. 3d 165, 2015-Ohio-1623, 41 N.E.3d 1164, ¶ 40, citing *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 272-273, 98 S.Ct. 2340, 57 L.Ed.2d 197 (1978), and *Quill Corp. v. North Dakota*, 504 U.S. 298, 306, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992).

In *Corrigan v. Testa*, 149 Ohio St.3d 18, 2016-Ohio-2805, 73 N.E.3d 381, we held that the tax imposed by R.C. 5747.212 could not be sustained as applied to Corrigan for two reasons: first, because the link between Ohio and the capital gain of a nonresident who did not engage in the underlying business was attenuated and second, because there was no showing that attributing the gain to Ohio as if it were business income actually related to the values giving rise to the gain. *See Corrigan* at ¶ 36, 48, 68-69.

We decided *Corrigan* after the briefing in this case, but the trust's counsel relied on it at oral argument. To be sure, there are two strong parallels between this case and *Corrigan*. The tax commissioner found that the trust was a nonresident here, just as Corrigan was a nonresident individual. And the tax commissioner here apportioned to Ohio the capital gain from the sale of the pass-through entity as if it were business income and did so in the very manner prescribed by R.C. 5747.212, the statute that the tax commissioner applied to Corrigan's capital gains from the sale of his ownership interest in Mansfield Plumbing, L.L.C., a pass-through entity.

A more comprehensive look at the situation, however, persuades us that the differences are more important than the similarities. Although the trust was a nonresident under the statute, it is undisputed that the grantor of the trust and contributor of the Logistics shares, T. Ryan Legg, was an Ohio resident in 2005 and for at least part of 2006. Moreover, unlike Corrigan, Legg was a founder and manager of the business of the pass-through entity—a material distinction, *see Corrigan* at ¶ 68 (finding the tax unconstitutional as applied to Corrigan "in light of the absence of any assertion or finding that Corrigan's own activities amounted to a unitary business with that of Mansfield Plumbing").

Properly analyzed, this case involves an Ohio resident who conducted business in significant part in Ohio through the corporate form and who disposed of his business and corporate interest not by a personal sale but by means of a trust that he created to accomplish his objectives for himself and his family. Although Legg deliberately set up a Delaware trust, his Ohio contacts are still material for constitutional purposes.

In the context of upholding the imposition of inheritance taxes, the United States Supreme Court made a statement that is equally applicable to Legg and his trust in this case. Namely, Legg's own "power to dispose of the intangibles was a potential source of wealth which was property in [his] hands from which [he] was under the highest obligation, in common with [his] fellow citizens of [Ohio], to contribute to the support of the government whose protection [he] enjoyed." *Curry v. McCanless*, 307 U.S. 357, 370-371, 59 S.Ct. 900, 83 L.Ed. 1339 (1939). Just as the inheritance taxes in *Curry* were not imposed on the deceased state resident herself, so too is the trust income tax not directly imposed on Legg—yet his own contacts with Ohio and with the business easily justify the imposition of the tax on the trust from the standpoint of due process. We hold that the tax assessment at issue did not violate the trust's due-process rights.

3. The assessment does not violate the trust's equal-protection rights

The trust argues that the taxation of its "qualifying trust amount" violates its equal-protection rights because no tax is imposed on a nonresident trust when the shares at issue are C-corporation shares rather than pass-through-entity shares. *See* R.C. 5747.01(BB)(5)(b). Under the trust's equal-protection theory, "nonresident trusts" as defined by the statute are "similarly situated" and must therefore be treated the same under the Equal Protection Clause with respect to their gain from selling corporate shares. Specifically, the trust argues that state tax law must ignore the distinction between taxpaying C corporations and pass-through entities.

A tax-law classification that "neither involves fundamental rights nor proceeds along suspect lines" will not "run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Hillenmeyer*, 144 Ohio St.3d 165, 2015-Ohio-1623, 41 N.E.3d 1164, at ¶ 30. And because the assessment of taxes is fundamentally a legislative responsibility, the constitutional standard is especially deferential in the context of tax-law classifications. *Id.*

The trust's burden as the constitutional claimant is heavy. "Under the rational-basis standard, a state has no obligation to produce evidence to sustain the rationality of a statutory classification. * * * Rather, a taxpayer challenging the constitutionality of a taxation statute bears the burden of negating every conceivable basis that might support the legislation." *Ohio Apt. Ass'n v. Levin*, 127 Ohio St. 3d 76, 2010-Ohio-4414, 936 N.E.2d 919, ¶ 34. And we have endorsed the pronouncement of the United States Supreme Court that """legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality""" among taxpayers. *Huntington Nat'l Bank v. Limbach*, 71 Ohio St. 3d 261, 262, 1994 Ohio 79, 643 N.E.2d 523 (1994), quoting *Nordlinger v. Hahn*, 505 U.S. 1, 10, 112 S. Ct. 2326, 120 L. Ed. 2d 1, quoting *McGowan v. Maryland*, 366 U.S. 420, 425-426, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961).

We hold that the trust falls well short of proving a constitutional violation in this context. "The comparison of only similarly situated entities is integral to an equal protection analysis." *GTE North, Inc. v. Zaino*, 96 Ohio St. 3d 9, 2002-Ohio-2984, 770 N.E.2d 65, ¶ 22, citing *Tigner v. Texas*, 310 U.S. 141, 147, 60 S.Ct. 879, 84 L.Ed. 1124 (1940). Equal protection "does not require things which are different in fact * * * to be treated in law as though they were the same." *Tigner* at 147. Corporations that are themselves taxpayers are differently situated with respect to state tax law than are pass-through corporations, and, by extension, shareholders who have elected to carry the corporation's income on their own tax returns are differently situated from those who have not. Moreover, pass-through corporations are more likely to be closely-held corporations in which the shareholder is directly involved in the business, and the fact that this is not universally the case does not defeat the rationality of the distinction overall, *see Vance v. Bradley*, 440 U.S. 93, 108, 99 S.Ct. 939, 59 L.Ed.2d 171 (1979) ("Even if the classification involved here is to some extent both underinclusive and overinclusive, and hence the line drawn by Congress imperfect, it is nevertheless the rule that in a case like this 'perfection is by no means required'"), quoting *Phillips Chem. Co. v. Dumas Indep. School Dist.*, 361 U.S. 376, 385, 80 S.Ct. 474, 4 L.Ed.2d 384 (1960).

Contrary to the trust's argument, this court's decision in *Boothe Fin. Corp. v. Lindley*, 6 Ohio St.3d 247, 6 Ohio B. 315, 452 N.E.2d 1295 (1983), does not require a different result. In *Boothe*, the taxpayer owned computer equipment that it leased to customers. The equipment was manufactured by IBM, which also leased the same type of property to other customers. Boothe reported its leased-out computers on its personal-property-tax return, as did IBM. The computers were taxed at 70 percent of "true value." As a manufacturer, IBM was permitted to determine the true value of its leased-out equipment by calculating its manufacturing cost less depreciation, whereas Boothe was required to use its acquisition cost less depreciation, which led to a true value that was six times that of IBM's true value for the same type of equipment. Boothe challenged the disparity, and this court held that it violated the guarantee of equal protection to Boothe. *Id.* at paragraph two of the syllabus.

We characterized IBM's leased-out equipment as being "grossly undervalued," and we held that "a taxpayer who leases equipment is denied equal protection when a competitor, who manufactures and leases essentially identical equipment, is allowed to grossly undervalue its property." *Id.* at 249-250. *Boothe* differs from the present case, however, because *Boothe* involved differential tax treatment of two business competitors with respect to the valuation of equipment directly used in their competing operations. By contrast, the distinction complained of here treats taxpayers differently by virtue of the tax pass-through status of the corporate entities in which they have invested. For reasons already stated, this differential treatment is rational.

We hold that the assessment at issue here does not violate the trust's equal-protection rights.

Conclusion

For the foregoing reasons, we vacate the BTA's rulings that the gain at issue constituted business income and that the trust was a resident trust under the statutes. We affirm the BTA's finding that the gain constituted a "qualifying trust amount" under the statute, and we vacate and remand to the tax commissioner for a determination of the proper Ohio allocation in accordance with this opinion.

Judgment accordingly.

O'CONNOR, C.J., and PFEIFER, O'DONNELL, KENNEDY, and O'NEILL, JJ., concur.

LANZINGER, J., concurs, with an opinion.

LANZINGER, J., concurring.

I concur in the majority's opinion but write separately to express concerns over its analysis of due process and reliance on our recent decision in *Corrigan v. Testa*, 149 Ohio St.3d 18, 2016-Ohio-2805, 73 N.E.3d 381. Based upon my reconsideration of that case in light of this one, and upon further reflection, I would overrule *Corrigan*. I would also presume the constitutionality of the tax assessed against the Legg Trust and hold that the presumption has not been rebutted.

The trust asserts that imposing a tax on its capital gains violates its due-process rights. Before *Corrigan*, our analysis would have had a clear starting point: the presumption that the state tax laws and the tax commissioner's application of them was constitutional. *See State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Edn.*, 111 Ohio St.3d 568, 2006-Ohio-5512, 857 N.E.2d 1148, ¶ 20 ("legislative enactments are entitled to a strong presumption of constitutionality"). But after *Corrigan*, the state has the burden to justify imposing the tax and the court must analyze each new case for fine points of distinction from *Corrigan*. In my view, this change is not merely the ordinary result of applying a recently decided case, it is a distortion of an integral tenet of proper constitutional review—that laws are presumed to be constitutional.

Summary of Corrigan

Briefly stated, *Corrigan* involved a nonresident individual who sold his ownership interest in a limited-liability company that did part of its business in Ohio. Under the version of R.C. 5747.212 that applied to the tax year at issue, the state assessed income tax on a portion of the gain from the sale based on the proportion of business activity that the limited-liability company had conducted in this state over three years. We held that the tax imposed under R.C. 5747.212 could not be sustained for two reasons: first, because of the attenuated link between Ohio and the capital gain of a nonresident who did not engage in the underlying business and second, because there was no showing that attributing the gain to Ohio as if it were business income actually related to the values giving rise to the gain. *Corrigan* at ¶ 36, 48, 68-69.

In this case, the shareholder that earned capital gains is a trust rather than an individual, and the majority distinguishes *Corrigan* on the grounds that Legg, the grantor of the trust, was an Ohio resident and participated in the business before the trust sold its shares. I do not disagree with this analysis, but I believe that it ought to be unnecessary. Our holding in *Corrigan* was not based on any showing made by the taxpayer but rather on our conclusion that the state had not controverted our constitutional concerns about the tax.

After considering the facts of the instant case, I believe that residency of the trust or the grantor or original involvement with the corporate business should be irrelevant. It ought to be enough that the business assets are connected to Ohio in order to tax part of the gain unless the taxpayer shows particular circumstances that make the exercise of state jurisdiction unreasonable.

Here, I am persuaded that it is the trust's status as investor in Ohio assets or an Ohio business that justifies the tax. Because *Corrigan* controverts that view, I am convinced that we should overrule that decision.

The Galatis *standard*

Stare decisis does not prevent us from revisiting *Corrigan* in this appeal. Because judge-announced constitutional doctrine is, unlike statutory construction, "beyond the power of the legislature to * * * 'correct,'" it is "incumbent on the court to make the necessary changes and yield to the force of better reasoning." *Rocky River v. State Emp. Relations Bd.*, 43 Ohio St.3d 1, 6, 539 N.E.2d 103 (1989).

I am not dissuaded by our stringent test for overruling precedent that is set forth in *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, paragraph one of the syllabus. First, after *Galatis*, we have "recognize[d] a considerable degree of merit" in the argument that "stare decisis should be applied with greater flexibility in cases of constitutional adjudication." *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027, 927 N.E.2d 1066, ¶ 90-91.

Second, in any event, the present situation satisfies the *Galatis* test in that (1) *Corrigan* was wrongly decided at the time, (2) *Corrigan* defies practical workability, and (3) abandoning *Corrigan* would not create an undue hardship for those who have relied on it.

Corrigan—*wrongly decided*

Corrigan was wrongly decided because we erroneously focused on whether Corrigan was engaged in the business that the pass-through entity had conducted in Ohio. Instead, we should have focused, as we do here, on the fact that gain from selling an investment in in-state assets and activities can usually be taxed in proper proportion—whether or not the person realizing the gain is a resident or engages in the business.

No one would dispute, for example, that a nonresident owing an asset located in Ohio—say, real estate in Cleveland—can be taxed on the gain derived from selling that asset. And the mere fact that Ohio assets are owned or activities are conducted through a corporate entity does not bar imposition of the tax. If a nonresident investor is the sole member of a limited-liability company that owns—as its sole asset—the real estate in Cleveland, it makes no difference whether that investor causes the company to sell the real estate, or whether the investor sells the company itself: either way, Ohio may tax the gain because the gain relates to property located in Ohio. We acknowledged this point in *Corrigan*, when we distinguished a decision of the Louisiana Supreme Court. In that case, the tax was justified because it prevented "avoidance of the Louisiana tax on a capital gain from the sale of a Louisiana asset through a manipulation of corporate forms." *Corrigan*, 149 Ohio St.3d 18, 2016-Ohio-2805, 73 N.E.3d 381, at ¶ 58.

The proper next step in the *Corrigan* analysis would have been to conclude that because the nonresident, Corrigan, was an almost 80 percent owner of a limited-liability company that conducted a portion of its business in Ohio, Ohio could properly tax that portion of the gain that related either to the Ohio business or to its assets in Ohio.

But we did not do this. First, we speculated that the gain might not actually relate to the Ohio business, given that the business had suffered losses in the preceding years; the possibility seemed strong that the gain might actually relate to some specific non-Ohio assets. *Corrigan* at ¶ 48. Second, we read U.S. Supreme Court precedent as distinguishing between state taxes imposed on those who *directly conducted* the in-state business activity and taxes imposed on those who *merely invested* in the business. *Corrigan* at ¶ 50-51, 69. In both respects we erred.

The main error on both points was in failing to presume the constitutionality of Ohio's tax statutes and the validity of the tax commissioner's application of them, to the extent that any rebuttal of their constitutionality must meet an enhanced evidentiary standard. *See Cleveland Gear Co. v. Limbach*, 35 Ohio St.3d 229, 231, 520 N.E.2d 188 (1988) (when tax legislation "is challenged on the ground that it is unconstitutional when applied to a particular state of facts, the burden is upon the party making the attack to present clear and convincing evidence of a presently existing state of facts which makes the Act unconstitutional and void when applied thereto"). More precisely, we should have required Corrigan, the taxpayer in the earlier case, to prove that under the apportionment prescribed by R.C. 5747.212, the income attributed to Ohio for tax purposes was not "'rationally related to "values connected with the taxing state."'" *Hillenmeyer v. Cleveland Bd. of Review*, 144 Ohio St.3d 165, 2015-Ohio-1623, 41 N.E.3d 1164, ¶ 40, quoting *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 272-273, 98 S.Ct. 2340, 57 L.Ed.2d 197 (1978), quoting *Norfolk & W. Ry. Co. v. Missouri State Tax Comm.*, 390 U.S. 317, 325, 88 S.Ct. 995, 19 L.Ed. 2d 1201 (1968). Without that showing, which Corrigan did not even attempt to make, the tax assessment should have been sustained—particularly in light of the fact that Corrigan's connection to Ohio was more than that of a minor investor: he was an 80 percent shareholder in a pass-through entity that did part of its business in Ohio and he claimed the benefit of material participation in that business for federal income-tax purposes.

By extension, the tax assessment against the Legg trust as a 35 percent owner of Total Quality Logistics, Inc., a pass-through entity that conducted an Ohio business and owned Ohio-based assets, should be sustained here inasmuch as the tax is, by statute, already limited to the portion of gain related to that company's Ohio business or to its physical assets located in Ohio.

It should be the trust's burden to establish a due-process violation, not the state's burden to justify imposing the tax in accordance with the statute. In *Corrigan*, we distorted the presumption, and we should correct that error by overruling that case now.

Corrigan—*workability*

Because *Corrigan* reverses the usual burden regarding the constitutionality of tax statutes, it will defy workability over the long haul. Quite simply, the tax commissioner should be able to enforce state law with the burden being on the taxpayer to prove any constitutional infirmity.

I am concerned that *Corrigan* sets the stage for difficulty in later cases. What if Legg had moved out of Ohio before he formed the trust? What if he had ceased his activity in conducting the business a year or more before putting the shares into the trust? As time goes on, the shadow cast by *Corrigan* will require us to make ever finer and more hypertechnical distinctions that are not themselves required by the statutes.

Corrigan—*no reliance*

Finally, I believe that the immediate overruling of *Corrigan* is appropriate precisely because its precedent is so recent. Our constitutional doctrine should be repaired before the legislature has changed the statutes and private parties have ordered their affairs in reliance on its holding.

Conclusion

I would overrule *Corrigan* and hold that the trust has failed to show either that the gain to be taxed lacked a sufficient connection to Ohio or that the statutory allocation does not fairly reflect values associated with the protections afforded by Ohio. I would also reject the due-process challenge in this case because the presumption of the tax's constitutionality has not been rebutted. In all other respects, I concur in the majority opinion.

APPENDIX B — OPINION OF THE OHIO BOARD OF TAX APPEALS, DATED MAY 5, 2015

OHIO BOARD OF TAX APPEALS

CASE NO(S). 2013-1469

T. RYAN LEGG IRREVOCABLE TRUST, (*et al.*),

Appellant(s),

vs.

JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO, (*et al.*),

Appellee(s).

Entered Tuesday, May 5, 2015

Mr. Williamson, Ms. Clements, and Mr. Harbarger concur.

This matter is considered by the Board of Tax Appeals upon a notice of appeal filed herein by the above-named appellant T. Ryan Legg Irrevocable Trust ("trust"), from a final determination of the Tax Commissioner. Therein, the Tax Commissioner ("commissioner") adjusted only the penalty associated with the trust income tax assessment against appellant relating to tax year 2006. The matter was submitted to the Board of Tax Appeals upon the notice of appeal, the statutory transcript ("S.T.") certified to this board by the Tax Commissioner, the record of this board's hearing ("H.R."), and the briefs filed by counsel. We note that exhibits 16 and W, upon which this board reserved ruling as to their admission into evidence at the time of hearing, shall be received into evidence.

At the outset, this board must address a motion to dismiss filed by the commissioner; specifically, the commissioner contends that it has not been demonstrated that the trustee of the trust "authorized this appeal, as well as the Legg Trust's filing of a petition for reassessment." Motion at 2. The commissioner contends that "in order for a trust to prosecute or defend a legal action, the *trustee* must provide the necessary authorization. The trustee is the sole party who may bring or defend an action on behalf of a trust. Without the requisite authorization of the trustee, the prosecution or defense of a legal action is invalid. *Schofield v. Cleveland Trust Co.* 149 Ohio St. 133, 144 (1948) ***."(Emphasis sic.) Motion at 1. The record establishes that in 2006, U.S. Trust Company was the trustee of the subject trust. H.R. at 98. "U.S. Trust Company was a wholly owned subsidiary of Charles Schwab and was sold by Charles Schwab at some point*** and***Charles Schwab Bank essentially replaced U.S. Trust Company as the trustee." H.R. at 123-124. Thereafter, in 2009, the trustee was changed again from Charles Schwab to UBS Trust. H.R. at 124. The record further reflects that in August 2008, Kevin R. Ghassomian and Mark A. Loyd of Greenebaum Doll & McDonald PLLC were declared the trust's representatives by the Charles Schwab Bank, Trustee, through its senior trust officer, Shawn P. Wilson; notice of such declaration was provided to the commissioner with the trust's objections to the commissioner's audit changes to its 2006 income tax return, prior to the assessment and filing of the petition for reassessment. S.T. at 88-89. Thereafter, in May 2009, the trust was formally assessed for income tax deficiencies in 2006 and a petition for reassessment was filed in July 2009 by the stated representatives, purportedly on behalf of the Charles Schwab Bank, as trustee for the trust. S. T. at 7-45. While the record indicates that as of June 5, 2009, UBS Trust Company, N.A. had been appointed the successor trustee to the Charles Schwab Bank, contrary to the trustee listed on the petition for reassessment, the record, as a whole, also indicates that UBS, Mr. Legg as grantor/beneficiary of the trust, and counsel themselves, at all times, considered Greenebaum Doll & McDonald (and its successor Bingham Greenebaum Doll LLP) to be the authorized representative of the subject trust. As such, we consider the misstated name of the trustee on the petition for reassessment to be a typographical error and find that the petition for reassessment, notice of appeal, and all pleadings filed by the trust, both before and after, were properly filed by the trust's authorized representative. See Ex. 23; H.R. at 228. Accordingly, the motion to dismiss is hereby denied.

In reviewing appellant's appeal, we recognize the presumption that the findings of the Tax Commissioner are valid. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121. It is therefore incumbent upon a taxpayer challenging a finding of the Tax Commissioner to rebut the presumption and establish a right to the relief requested. *Belgrade Gardens v. Kosydar* (1974), 38 Ohio St.2d 135; *Midwest Transfer Co. v. Porterfield* (1968), 13 Ohio St.2d 138. Moreover, the taxpayer is assigned the burden of showing in what manner and to what extent the Tax Commissioner's determination is in error. *Kern v. Tracy* (1995), 72 Ohio St.3d 347; *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213. Where no competent and probative evidence is presented to this board by the appellant to show that the Tax Commissioner's findings are incorrect, then the Board of Tax Appeals must affirm the Tax Commissioner's findings. *Kern,* supra; *Kroger Co. v. Limbach* (1990), 53 Ohio St.3d 245; *Alcan,* supra.

The facts leading to the instant appeal are best summarized by the commissioner in his final determination, as follows:

> "In November 2005, T. Ryan Legg *** transferred 65 shares of Total Quality Logistics, Inc., *** an Ohio S Corporation, to the petitioner [the subject trust]. The Trust sold the shares in February 2006, which created the gain at issue. The Trust was assessed when the Department determined that the gain at issue was a 'qualifying trust amount' under R.C. 5747.01(BB)(2), and thus subject to Ohio taxation. The petitioner contends that the gain from the Trust's sale of stock in an Ohio S Corporation is not a qualifying trust amount, but instead is nonbusiness income allocable to the Trust's state of domicile." S.T. at 1.

Specifically, Mr. Legg and his friend, Ken Oaks, had formed and operated a trucking business, Total Quality Logistics, Inc. ("TQL"), an Ohio Subchapter S corporation. Mr. Legg and Mr. Oaks each owned 50%, i.e., 100 shares each, of the business. The owners decided to part ways, and around August or September 2005, Mr. Legg stopped participating in the business and going to the office. H.R. at 96. Mr. Legg tendered his resignation in November of 2005 and thereafter created the subject trust and funded it by transferring 65 of his shares of TQL stock into it. H.R. at 57, 60-61. In December 2005, Mr. Legg entered into a purchase agreement with Mr. Oaks for the sale of the 65 shares of TQL stock. Ex. F; H.R. at 75-76. The sale closed on February 3, 2006, and the trust sold the 65 shares of TQL stock to Mr. Oaks for $18,525,000. Ex. F; H.R. at 115.

R.C. 5747.02(A) provides in pertinent part:

> "For the purpose of providing revenue for the support of schools and local government functions, to provide relief to property taxpayers, to provide revenue for the general revenue fund, and to meet the expenses of administering the tax levied by this chapter, there is hereby levied on every individual, trust, and estate residing in or earning or receiving income in this state, *** and on every individual, trust, and estate otherwise having nexus with or in this state under the Constitution of the United States, an annual tax *** *measured in the case of trusts by modified Ohio taxable income* under division (D) of this section." (Emphasis added.)

"Modified Ohio taxable income" is considered "the sum of the amounts described in division (BB)(4)(a) to (c)" of R.C. 5747.01, i.e., R.C. 5747.01(BB)(4)(a)(i) and (ii), amounts attributable to the trust's modified business income, R.C. 5747.01(BB)(l) and the trust's qualifying investment income, R.C. 5747.012; R.C. 5747.01(BB)(4)(b), amounts attributable to the "qualifying trust amount," R.C. 5747.01(BB)(2); and R.C. 5747.01(BB)(4)(c)(i) and (ii), amounts attributable to "modified nonbusiness income," R.C. 5747.01(3). R.C. 5747.01(BB) goes on to provide that "[i]f the allocation and apportionment of a trust's income under divisions (BB)(4)(a) and (c) of this section do not fairly represent the modified Ohio taxable income of the trust in this state, the alternative methods described in division (C) of section 5747.21 of the Revised Code may be applied in the manner and to the same extent provided in that section."

Thus, to the extent specified, we must review the trust's objections to the commissioner's calculations used to determine the amount of modified Ohio taxable income. Appellant first contends that the requirements in R.C. 5747.01(BB)(2)(a) and (b) for a "qualifying trust amount" have not been met, but we disagree. R.C. 5747.01(BB)(2) provides:

> "(2) 'Qualifying trust amount' of a trust means capital gains and losses from the sale, exchange, or other disposition of equity or ownership interests in, or debt obligations of, a qualifying investee to the extent included in the trust's Ohio taxable income, but only if the following requirements are satisfied:

> "(a) The book value of the qualifying investee's physical assets in this state and everywhere, as of the last day of the qualifying investee's fiscal or calendar year ending immediately prior to the date on which the trust recognizes the gain or loss, is available to the trust.
>
> "(b) The requirements of section 5747.011 *** of the Revised Code are satisfied for the trust's taxable year in which the trust recognizes the gain or loss.
>
> "Any gain or loss that is not a qualifying trust amount is modified business income, qualifying investment income, or modified nonbusiness income, as the case may be."

We find that regardless of the tenuous relationship between Mr. Legg and Mr. Oaks, the record establishes that the book value of the TQL assets was available to the trust, whether it was actually requested or not, as it was utilized by the trust's tax preparer; it was therefore "available," i.e., "a person [was] able to learn of" it. R.C. 5747.01(BB)(6). H.R. at 118, 133, 226, 241. See, also, *Alcan,* supra. Further, the commissioner represents that it is undisputed that the second requirement for a "qualifying trust amount" has been met, as the trust was a 32.5% interest holder in TQL, and therefore met the statutory 5% requirement set forth in R.C. 5747.01(BB)(2)(b). Commissioner brief at 13. The trust cites to this board's decision in *Random House, Inc. v. Tracy* (May 14, 1993), BTA No. 1991-A-1329, unreported, as support for its position that the book value was not "available" to the trust, as that term was defined therein. We find the *Random House* case inapposite herein, as it concerned a specific franchise tax statutory provision, namely, R.C. 5733.051(G), and the determination of whether the location of the payor's activities relating to patent and copyright royalties and technical assistance fees was available for purposes of allocating/apportioning such amounts to this state. As previously indicated, R.C. Chapter 5747 contains a definition of "available," and we need not look any further to conclude that the commissioner correctly determined that the information in question was "available."

Appellant next contends that the gain experienced by the trust from the sale of the stock constituted *nonbusiness* income, and, as such, was not taxable. Specifically, the trust argues that its "gain on the sale of TQL stock is nonbusiness income because the Trust did nothing more than hold and sell the TQL stock. *** These actions do not constitute a trade or business under the tax code. By definition, therefore, the TQL stock sale gain was nonbusiness income." Trust Brief at 11.

R.C. 5747.01(B) and (C) provide:

> "(B) 'Business income' means income, including gain or loss, arising from transactions, activities, and sources in the regular course of a trade or business and includes income, gain, or loss from real property, tangible property, and intangible property if the acquisition, rental, management,

> and disposition of the property constitute integral parts of the regular course of a trade or business operation. 'Business income' includes income, including gain or loss, from a partial or complete liquidation of a business ***."
>
> "(C) 'Nonbusiness income' means all income other than business income and may include, but is not limited to, compensation, ***capital gains***."

Based upon the clear language of the foregoing statutory provisions, we conclude that any income arising out of a liquidation of a business, i.e., Mr. Legg's sale of his ownership interest in TQL, via his stock, constitutes "business income" in Ohio, as a gain from the partial liquidation of his interests in TQL.

Next, appellant contends that the subject trust is a non-resident trust, domiciled in Delaware, and therefore, pursuant to the version of the statute in effect at the time of the stock sale, was not liable for tax. While the trust provides that it "shall be construed and administered pursuant to the law of the State of Delaware," R.C. 5747.01(I)(3) provides that a "trust resides in this state for the trust's current taxable year to the extent *** that the trust consists directly or indirectly, in whole or in part, of assets, net of any related liabilities, that were transferred ***to the trust by ***(ii) [a] person who was domiciled in this state for the purposes of this chapter when the person *** transferred assets to an irrevocable trust, but only if at least one of the trust's qualifying beneficiaries is domiciled in this state for the purposes of this chapter during all or some portion of the trust's current taxable year[.]" The trust agreement was entered into on November 18, 2005 and the sale of the shares of stock out of the trust closed on February 3, 2006; Mr. Legg testified that he lived in Cincinnati from 2001 to mid-2006. Ex. 1; H.R. at 67-68, 71. Clearly, Mr. Legg's testimony established that he was domiciled in Ohio for at least a portion of the current tax year under consideration, i.e., 2006, and, domiciled in Ohio at both the time of transferring the stock into the trust and the time the stock was sold. Finally, the trust agreement clearly lists Mr. Legg as a beneficiary of such trust. Therefore, we find the subject trust should be taxed as a resident trust, pursuant to R.C. 5747.01(BB)(4)(c)(i).

With regard to appellant's constitutional claims, we make no finding in relation thereto. Although the Ohio Supreme Court has authorized this board to accept evidence on constitutional points, it has clearly stated that we have no jurisdiction to decide constitutional claims. *Cleveland Gear Co. v. Limbach* (1988), 35 Ohio St.3d 229; *MCI Telecommunications Corp. v. Limbach* (1994), 68 Ohio St.3d 195, 198.

Accordingly, we find the appellant has failed to meet its burden of demonstrating the error in the commissioner's findings. See *Kern,* supra; *Kroger,* supra; *Alcan,* supra. As such, this board finds that the Tax Commissioner's conclusions in this matter were reasonable and lawful. It is the decision and order of the Board of Tax Appeals that the final determination of the Tax Commissioner must be and hereby is affirmed.

I hereby certify the foregoing to be a true and complete copy of the action taken by the Board of Tax Appeals of the State of Ohio and entered upon its journal this day, with respect to the captioned matter.

/s/______________________________
Kathleen M. Crowley, Board Secretary

BOARD OF TAX APPEALS		
RESULT OF VOTE	YES	NO
Mr. Williamson	/s/	
Ms. Clements	/s/	
Mr. Harbarger	/s/	

APPENDIX C — DENIAL OF REHEARING OF THE SUPREME COURT OF OHIO, FILED MARCH 15, 2017

THE SUPREME COURT OF OHIO

Case No. 2015-0917

T. RYAN LEGG IRREVOCABLE TRUST,
UBS TRUST COMPANY, N.A., TRUSTEE,

v.

JOSEPH W. TESTA, TAX
COMMISSIONER OF OHIO

RECONSIDERATION ENTRY

APPEAL FROM THE BOARD OF TAX APPEALS

It is ordered by the court that the motion for reconsideration in this case is denied.

(Board of Tax Appeals; No. 2013-A-1469)

/s/
Maureen O'Connor
Chief Justice