

In the  
**Supreme Court of Ohio**

STATE OF OHIO ex rel.  
OHIO ATTORNEY GENERAL,

Plaintiff-Appellee,

v.

THE SHELLY HOLDING CO., *et al.*,

Defendant-Appellants.

: Case No. 2011-0252  
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: On Appeal from the  
:  
: Franklin County  
:  
: Court of Appeals,  
:  
: Tenth Appellate District  
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:  
: Court of Appeals  
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: Case No. 09AP-938  
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**MERIT BRIEF OF APPELLEE  
OHIO ATTORNEY GENERAL MICHAEL DEWINE**

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## INTRODUCTION

The state and federal governments protect Ohio's air from harmful pollutants through a cooperative and comprehensive scheme of environmental laws. Federal statutes and regulations, as well as state statutes and rules, all intertwine to control air emissions in Ohio.

Enforcement mechanisms are an integral part of this framework; they both stop unlawful emissions and deter future violations. In Ohio, the law authorizes civil penalties of up to \$25,000 per violation per day against air-permit holders that fail to comply with their emissions standards or limitations. The specter of civil penalties motivates permit holders to correct present violations promptly and deters them from turning a blind eye to continuing or future violations. This Court interprets civil penalty provisions with these goals in mind. See *State ex rel. Brown v. Dayton Malleable* (1982), 1 Ohio St. 3d 151.

The Shelly Holding Company repeatedly fails to adhere to the terms of its air permits. After stipulating to liability on thirty-two counts, and after being found liable on additional counts at trial, the company now brings this Court its final play: a request that the Court judicially refashion the prescribed method for calculating civil penalties that both federal and state law require. See 42 U.S.C. § 7413(e) and Ohio Adm. Code 3745-31-01(AAAAAA)(2)(mmm) (incorporating 42 U.S.C. § 7413 by reference into state law).

The prescribed method for calculating civil penalties is this: A violation discovered through a failed emissions test is presumed to continue until the violator establishes that compliance has been achieved. See 42 U.S.C. § 7413(e)(2) and Ohio Adm. Code 3745-31-01(AAAAAA)(2)(mmm). There is a safety valve, however, and it affords ample opportunity for violators to mitigate potential penalties: The presumption of a continuing violation can be overcome if the violator proves by a preponderance of the evidence that no violation occurred on

certain intervening days or that the violation was not, in fact, continuing in nature. 42 U.S.C. § 7413(e)(2).

Shelly wants to upend this settled and sensible test, and instead of a safety valve to minimize penalties, it wants something more like an escape hatch. Under Shelly's view, a failed emissions test would establish only that a violation occurred on the day of the test, and that come the following day, everyone should assume that the facility achieved compliance, *even without any proof that the facility changed its ways*. The applicable statutes and regulations do not support this theory, and the Court should reject Shelly's unfounded approach.

Shelly's constitutional claim fares no better. The Due Process Clause requires that a civil defendant have the opportunity to respond to the evidence against it. Shelly received that opportunity at trial. There, Shelly could have invoked the law's safety valve to reduce the number of days it was penalized for a continuing violation. It could have either presented evidence that it did not operate its plants every day after the failed test, or shown that the violation was not actually a continuing one by identifying when it corrected the emissions problems. Shelly chose neither option. Instead, Shelly pursued an unrecognized defense that the Tenth District properly rejected. (As it does here, Shelly argued below that the method for assessing penalties should be radically altered). Despite Shelly's efforts to dress up its tactical shortcomings as a constitutional claim, Shelly received all the process it was due.

### STATEMENT OF THE CASE AND FACTS

- A. In partnership with the federal government, Ohio enforces a comprehensive scheme of environmental laws designed to protect the quality of Ohio air.**

Ohio regulates its air quality through an integrated web of federal law, state law, and state and federal administrative regulations.

## 1. The federal Clean Air Act

At the core of Ohio's air law lies the federal Clean Air Act, designed "to protect and enhance the quality of the Nation's air resources." 42 U.S.C. § 7401(b)(1). Ohio has actively participated in the implementation and enforcement of the Act for decades. See 40 C.F.R. § 52.1870.

The Clean Air Act establishes a cooperative federal-state regulatory regime, with the U.S. Environmental Protection Agency and the State playing distinct roles. See 42 U.S.C. § 7410. The Act directs the U.S. EPA to establish National Ambient Air Quality Standards, or NAAQS, for certain types of air pollutants. 42 U.S.C. § 7409. The U.S. EPA must set the NAAQS at a level necessary "to protect the public health." *Id.* § 7409(b)(1). (Current NAAQS address, among other things, particulate matter, nitrogen oxides, carbon monoxide and sulfur dioxide—all materials that Shelly's asphalt plants emit. See 40 C.F.R. §§ 50.1-50.17.)

The Act then gives "[e]ach State . . . the primary responsibility for assuring air quality within [its] geographic area." 42 U.S.C. § 7407(a). It instructs each State to "submit[] an implementation plan" specifying how the NAAQS "will be achieved and maintained within each air quality control region" in the State. *Id.*; see also *id.* at § 7410(a) (specifying procedures for plan adoption). The implementation plan, known as a "SIP," contains a comprehensive set of statutes and rules that the State will enforce and includes provisions for permits, enforcement, and emissions monitoring, all of which are designed to ensure that the State achieves the NAAQS. See, e.g., 42 U.S.C. § 7410(a)(2)(A)-(M). The U.S. EPA reviews each State's SIP, and upon EPA approval, the SIP is added to the Code of Federal Regulations and becomes federal law. 40 C.F.R. §§ 52.1870-52.1919 (Ohio's SIP). Each State then has primary enforcement responsibility for its SIP. See 42 U.S.C. § 7414(b)(1).

A key aspect of each state's SIP is the air permit program. The program imposes emissions limits, operational restrictions, monitoring and testing requirements, and record-keeping obligations on air-pollutant sources.

Along with the SIP, the U.S. EPA has delegated to Ohio the authority to implement and enforce federal emission limits for new sources such as the plants at issue here. See 42 U.S.C. § 7411(c). Based on that delegated authority, Ohio must apply its air pollution enforcement program consistent with U.S. EPA regulations and guidance. See *id.*; see also 49 F.R. 28708 (Delegation of Authority to States).

## **2. Ohio's Air Pollution Control Act**

To implement and enforce the SIP as a matter of state law, Ohio's Air Pollution Control Act and its corresponding rules prescribe state air pollution controls and emissions standards. In line with the mission of the federal Clean Air Act, the state statute aims "to protect and enhance the quality of the state's air resources so as to promote the public health, welfare, economic vitality, and productive capacity of the people of the state." R.C. 3704.02(A)(1). To that end, the statute gives the Director of Ohio EPA authority under state law "to adopt and maintain" environmental controls "consistent with the federal Clean Air Act." R.C. 3704.02(A)(2).

Ohio's statute further hews to federally established parameters by declaring that it, and "all rules adopted under it, and all permits . . . issued under it shall be construed, to the extent reasonably possible, to be consistent with the federal Clean Air Act." R.C. 3704.02(B).

### **a. Ohio EPA issues air permits to monitor, test, and limit emissions in an effort to meet the federally established NAAQS.**

Air permits are a major component of Ohio's scheme for pollution control. See R.C. 3704.03(F) (authorizing Ohio EPA to implement a permitting system to control emissions). The permitting system helps the State achieve the NAAQS, as it allows Ohio EPA to determine

whether a particular facility's air emissions will impact the NAAQS, to limit and regulate emissions as necessary, and to monitor attainment and nonattainment of the federally established standards. See Ohio Adm. Code 3745-31-05(A)(1)-(2).

Facilities must ask Ohio EPA for permission to discharge air pollutants. Ohio EPA examines each permit application and approves a set level of allowable emissions, based in part on how the facility's emissions will affect the attainment status of the NAAQS in the region where the facility is located. Once permitted, facility owners have a continuing obligation to operate within the parameters of their permit.<sup>1</sup> As part of that obligation, facilities must file periodic reports with Ohio EPA and conduct emissions testing. R.C. 3704.03(I); Ohio Adm. Code 3745-15-03, -04.

Each permit specifies the facility's "Applicable Compliance Method," which details the federally approved emissions tests that the facility must "conduct[] to demonstrate compliance" with the permit. See, e.g., AG Supp. at 3, 10-11, 14-16, 19, 21, 24, 26 (Shelly's air permits). Permitted facilities are held to "federal standards of performance," Ohio Adm. Code 3745-31-05(A)(2)(b), so the testing methods prescribed in each permit must comply with federal regulations. See Ohio Adm. Code 3745-77-07(A)(3)(a)(i) (incorporating federal regulations).

These emissions tests—also known as "stack tests"—are expensive and technically complex procedures. Facilities must conduct tests at regular intervals, which they schedule by filing with Ohio EPA a Notice of Intent to Test at least 30 days prior to the planned test. See Ohio EPA, General Testing and Reporting Requirements, available at <http://epa.ohio.gov/portals/27/files/ITT.pdf> (last visited Aug. 22, 2011). Most facilities prepare

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<sup>1</sup> Facilities may ask Ohio EPA to modify their permit as necessary. When a modification is sought, Ohio EPA must consider whether the modification will affect State efforts to achieve the NAAQS. Increasing allowable emissions for one plant may mean limiting the emissions of new permit applications in the same region. See Ohio Adm. Code 3745-31-05(A).

for the tests in advance to ensure compliance, and they may ask to postpone testing if circumstances arise that could prevent them from testing properly. *Id.* Some permit holders, including Shelly, own their own mobile stack-testing equipment so they can test emissions at their plants prior to the official tests. See Tr. Vol. VIII at 1648-49, 1779-81.

On testing day, facility emissions are tested using the method specified in the facility's permit. For Shelly, that meant operating its air-pollution sources at the highest capacity possible without becoming a safety hazard. See, e.g., AG Supp. at 3, 11, 15, 16, 19, 20, 21, 26. As a source operates, stack-testing instruments take samples from a stream of gases emitted by the source. After collecting samples, analysts determine air-pollution discharge rates, concentrations, and parameters. Those results are then compared to the permit terms to assess whether the facility complies with its emission limits. If the test results are equal to or lower than the permitted emissions limits, the facility is operating in compliance with its permit. Results higher than permit limits, however, place the facility out of compliance and in violation of the law.

**b. Ohio law contains a number of enforcement mechanisms to encourage swift compliance with emissions limits and to deter noncompliance.**

State law gives the Ohio EPA Director broad powers to ensure that facilities comply with their air permits. R.C. 3704.03. These enforcement mechanisms are designed both to encourage compliance and to deter noncompliance. See, e.g., R.C. 3704.06(C). Violators may be prosecuted. R.C. 3704.06(A). At the request of the Director, the Attorney General may file suit for “an injunction, a civil penalty, or any other appropriate proceedings . . . against any [entity] violating” the terms of its air permits. R.C. 3704.06(B).

If a facility is violating its permit, the trial court may assess civil penalties of up to “twenty-five thousand dollars *for each day of each violation.*” R.C. 3704.06(C) (emphasis added).

Beneath that \$25,000-per-day ceiling, trial courts have significant discretion to determine the amount of the penalty. See *Dayton Malleable*, 1 Ohio St. 3d at 157-58. That discretion allows courts to consider both the magnitude and level of the violator's defiance as well as any mitigating factors, and to determine the penalty amount that will "deter the polluting activity" in the future. *Id.* at 157 (citation and quotation omitted).

**B. Shelly operates asphalt plants throughout Ohio, and its air permits require that it keep plant emissions at an allowable level.**

*The Defendants-Appellants.* CRH plc. is a multi-billion-dollar international building materials company headquartered in Dublin, Ireland. State Ex. 318 at 3; Tr. Vol. VI at 1121, 1139-40, 1142; Tr. Vol. VII at 1334. It wholly owns a corporation in Washington D.C., which in turn wholly owns Shelly Holding Company. *Id.* Shelly Holding is the immediate parent of Shelly Materials, Inc. and Allied Corporation, appellants here, along with a number of other Shelly companies (collectively, "Shelly"). Tr. Vol. VI at 1122; Tr. Vol. VII at 1337-38. Shelly is a multi-million-dollar paving operation engaged in hot-mix asphalt production, among other things. See State Ex. 731; Tr. Vol. VII at 1381, 1383.

*Shelly's Operations.* Shelly owns and operates nearly 100 facilities across Ohio, with plants in 74 of Ohio's 88 counties. Tr. Vol. VI at 1130-31. Approximately 44 of those plants are hot-mix asphalt plants, 25 of which are the subject of the underlying enforcement case. Tr. Vol. I at 148; Tr. Vol. VI at 1130-31.

All of Shelly's hot-mix asphalt plants are sources of air contaminants. Tr. Vol. IX at 1899-1900. To produce asphalt, aggregate is heated and dried in a large-scale burner. Tr. Vol. I at 170-76, 180. The burners are about six feet long, create a 10-12 foot flame, and reach temperatures of about 2,000 degrees Fahrenheit. See Tr. Vol. I at 182-83. Aggregate is then combined with heated liquid asphalt to create the final product. See Tr. Vol. I at 170-76, 180.

Throughout this process, a baghouse captures the burner-generated emissions. See Tr. Vol. I, at 170-76, 180. But even with the baghouse trapping some of the emissions, each asphalt plant releases contaminants into the air, including particulate matter, carbon monoxide, nitrogen oxides, sulfur dioxide, and volatile organic compounds. See generally Tr. Vol. IX at 1899-1900.

Like all similar plants across Ohio, Shelly's asphalt plants must hold air permits. Shelly's permits specify that it must conduct emissions tests "to demonstrate compliance" with its emissions limits. See, e.g., AG Supp. at 6. Those tests, the permits state, must occur "at or near [the facility's] *maximum capacity*." *Id.* (emphasis added).

As its permits require, Shelly conducted stack tests. When the testing days arrived, the stack tests revealed that emissions from Plants 63, 73, 90, 91, and 95 exceeded the limits of their permits—facts that Shelly does not dispute. See Trial Court Op. 46-48.

**C. After emissions tests revealed that Shelly's asphalt plants violated their permit terms, the Attorney General sued to enforce Ohio's air laws.**

In July 2007, the Attorney General filed a complaint against Shelly, asserting twenty separate claims for relief. See R.C. 3704.06(B) (authorizing the Attorney General to sue permit violators at the request of Ohio EPA). The complaint alleged numerous and persistent environmental violations at Shelly's plants, including violations at 25 asphalt plants, 30 portable industrial generators, and one liquid asphalt terminal. Shelly stipulated to liability on thirty-two claims within twelve counts of the complaint, and the common pleas court heard the rest of the claims at a bench trial held over the course of seven months. The trial court ultimately found Shelly liable on thirteen of the twenty counts in the complaint and assessed a \$350,123.52 civil penalty. Trial Op. 100.

The permit violations in Count Seven—those at Plants 63, 73, 90, 91 and 95—are the only ones relevant to this appeal. See Trial Op. 44-48. During the trial proceedings, Shelly agreed

that the failed emissions tests demonstrated permit violations at the Count Seven Plants. The Attorney General identified evidence demonstrating both (1) the date Shelly failed its emissions test at each of the plants, and (2) when each plant returned to compliance, either through a successful stack test or through a newly issued permit authorizing them to operate at higher emission levels. Trial Court Op. 44-48. Shelly did not contest these aspects of the Attorney General's case.

As for calculating civil penalties, the Attorney General argued that the method set out in 42 U.S.C. § 7413(e) applied. Under this method, Shelly's failed stack tests were prima facie evidence of continuing violations ranging from the date of each plant's failed test to the date each plant returned to compliance. Because Shelly failed to identify evidence that its non-compliant plants did not operate every day following the failed tests or that it did something to correct the violations (such as perform maintenance on the plants) in the interim, the Attorney General asked the trial court to assess civil penalties for each day following the failed tests until the date the plants returned to compliance—a total of 2,912 days. See R.C. 3704.06(C) (authorizing civil penalties calculated per violation per day).

Shelly took a different tack and presented a novel defense based on a theory of "normal operations." See Trial Op. 45. According to Shelly, it should only be found to have violated the terms of its permits on the day it failed its emissions tests, given that emissions tests are conducted at maximum capacity and, as Shelly claimed, its plants typically do not operate at maximum capacity. See *id.*

The trial court agreed with Shelly's legal theory and assessed civil penalties only for the days of the failed emissions tests. Trial Op. 45-46. The Attorney General appealed. Shelly neither appealed nor cross-appealed.

**D. The Tenth District reversed the trial court’s determination of civil penalties and remanded the case for recalculation.**

The Tenth District reversed. *State ex rel. Ohio Att. Gen. v. Shelly Holding Co.* (10th Dist.), 191 Ohio App. 3d 421, 2010-Ohio-6526 (“App. Op.”). After failing a stack test, “a facility must demonstrate compliance by conducting another stack test that meets emissions standards.” *Id.* ¶ 62. Accordingly, the court held, a failed stack test triggers a presumption that the noncompliant facility remained out of compliance—and was therefore liable for a continuing violation—“until the subsequent stack test determined the plant no longer was violating the permit limitation.” *Id.* ¶ 66. “[T]o hold otherwise would allow a violator to continue the harmful conduct at least until the next stack test, knowing no penalty will be imposed for the interim violations.” *Id.* ¶ 66. The evidence Shelly offered for its “normal operations defense”—that stack tests were mere snapshots of emissions while the plant was operating at maximum capacity and not representative of Shelly’s day-to-day emissions—simply was not relevant to the applicable legal inquiry. See *id.* ¶¶ 58, 62. The court remanded the case to the trial court to “calculate again, in accordance with this decision, the number of days Shelly violated [its permits] and then impose the fine, in its discretion, as it deems appropriate.” *Id.* ¶ 66.

This Court accepted Shelly’s petition for discretionary review.

**ARGUMENT**

**Appellee Ohio Attorney General’s Proposition of Law No. 1:**

*A failed emissions test is prima facie proof of a permit violation that is presumed to continue until compliance is demonstrated, unless the violator can prove by a preponderance of the evidence that the violation was not continuing in nature.*

The Tenth District applied the standard prescribed by both federal and state law to determine the duration of Shelly’s continuing violations. When the Attorney General presents uncontested evidence that a facility failed an emissions test, he establishes a prima facie case that

the facility operated in violation of its permit not only that day, but every day thereafter until the facility demonstrated compliance. The permit holder then has an opportunity to rebut that showing and mitigate its penalties, either by identifying days on which it did not operate its facilities after the failed test or by demonstrating that it took steps (such as performing necessary maintenance) that brought its facility back into compliance. If the permit holder does not do so, the trial court must base its assessment of civil penalties on the number of days that elapsed from the date of the failed test until the return to compliance. Shelly's alternative theory—that a failed test proves a violation for one day only, and that the Attorney General must present evidence for each and every day of a continuing violation—not only has no support in the applicable law, but would impose an insurmountable burden on the enforcement agency and on businesses across Ohio.

**A. Ohio law incorporates the Clean Air Act's standard for determining that a continuing violation has occurred and assessing civil penalties.**

Shelly's multi-pronged attack boils down to one mistaken assumption: That the skeletal enforcement provision in R.C. 3704.06(B)—and *only* R.C. 3704.06(B)—comprises the whole body of law from which liability is determined and penalties are assessed. See Apt. Br. 8. But that narrow focus ignores the rest of the legal landscape that spells out the method for calculating civil penalties. Examined in light of *all* the applicable laws, Shelly's argument fails.

**1. R.C. 3704.06(B) authorizes the Attorney General to seek civil penalties; other laws determine how to calculate them.**

The Attorney General brought suit against Shelly by invoking its enforcement authority under Ohio's Air Pollution Control Act. See Shelly Supp. 2 (AG Comp. 2 (citing R.C. 3704.06(B))). R.C. 3704.06(B) authorizes "[t]he attorney general, upon request of the director [of Ohio EPA]" to "bring an action for . . . a civil penalty . . . against any person violating" their permitted emissions limits. R.C. 3704.06(B); see also R.C. 3704.05 (requiring permit holders to

comply with their permits). Once the Attorney General has filed suit, courts may assess “a civil penalty” against violators “upon the showing that such person has violated this chapter or rules adopted thereunder”—including violations of the statutes and rules requiring entities to comply with the terms of their air permits. R.C. 3705.06(B); see also R.C. 3704.04(C) and Ohio Adm. Code 3745-31-02(A).

Shelly isolates three words from the enforcement provision—that civil penalties may be assessed “*upon the showing*” that a facility has violated its permit, R.C. 3704.06(B)—and extrapolates that the Attorney General only “shows” that a facility is liable for a continuing violation of its permit terms *if he puts on evidence that the facility exceeded its emissions limits each and every day following a failed emissions test*. See Apt. Br. 8. The statute says nothing of the kind.

By its plain text, the enforcement provision has only two roles: (1) to authorize the Attorney General to litigate permit violations in court, and (2) to confirm the court’s power to do something about it. See R.C. 3704.06(B). Nothing about that delegation of authority even hints at the Attorney General’s burden of proof for establishing a continuing violation, much less the arduous evidentiary requirements that Shelly reads between the lines. See *id.* The enforcement provision instructs the Attorney General to demonstrate liability by making a “showing” that a violation occurred; nowhere does it identify *what* that showing must be. Guidance on that front lies elsewhere.

**2. The Ohio Administrative Code incorporates by reference the federal enforcement standard of assessing civil penalties for each day following a failed emissions test until a facility returns to compliance.**

The Ohio Administrative Code contains what is missing from R.C. 3704.06(B)—a standard governing the burden of proof for establishing continuing violations and for calculating civil penalties. The state rules expressly adopt the federal Clean Air Act’s standard for proving

violations and assessing penalties by incorporating into state law the relevant federal statute. See Ohio Adm. Code 3745-31-01(AAAAAA)(2)(mmm). The incorporated standard, lodged in 42 U.S.C. § 7413(e), is the *exact standard* that the Tenth District applied (and that the Attorney General defends here). Section 7413 says that “[a] penalty may be assessed for each day of violation.” 42 U.S.C. § 7413(e)(2). It goes on to explain how to “determine[e] the number of days of violation for which a penalty may be assessed.” *Id.* “For purposes of determining the number of days of violation for which a penalty may be assessed,” the statute says that:

Once “the plaintiff makes a prima facie showing that the conduct or events giving rise to the violation are likely to have continued[,] . . . the days of violation shall be presumed to include the date [the facility learns that it is violating its permit, e.g., the date of the failed emissions test] and *each and every day thereafter until the violator establishes that continuous compliance has been achieved*, except to the extent that the violator can prove by a preponderance of the evidence that there were intervening days during which no violation occurred or that the violation was not continuing in nature.” 42 U.S.C. § 7413(e)(2).

This federally adopted, state-incorporated standard controls this case, and it prescribes the method for evaluating a continuing violation and assessing civil penalties: (1) If the plaintiff makes a “prima facie showing” that the violation was likely a continuing one, then (2) “presume[]” that the violator was out of compliance “each and every day” after the facility learned of its noncompliance; and (3) shift the burden to the violator to prove by a preponderance of the evidence that there were days after the notice of noncompliance “during which no violation occurred or that the violation was not continuing in nature.” See *id.*

Shelly agrees that the federal Clean Air Act “expressly provides that a continuing violation can be presumed” in this fashion, Apt. Br. 13 (citing 42 U.S.C. § 7413(e)(2)), but misses the fact that the *identical standard* has been incorporated by reference into state law and therefore applies to Ohio emitters. Accordingly, Shelly’s claim that “Ohio’s environmental statutes do not provide for any presumption” similar to that in the Clean Air Act, see Apt. Br. 13, is simply

wrong. Ohio law provides for *the same* presumption of continuing violations as the Clean Air Act does. So Shelly gets nowhere by noting that the Attorney General “only alleged violations of Ohio law and brought its case only pursuant to Ohio law.” Apt. Br. 13. When it comes to the standards for determining a continuing violation and assessing civil penalties—as the rule incorporating 42 U.S.C. § 7413(e)(2) confirms—state law is inextricably bound up with the federal standard. See Ohio Adm. Code 3745-31-01(AAAAAA)(2)(mmm).

Synchronizing the state-law standard with the federal penalty standard in this manner—effectively making them one and the same—further strengthens the integration of federal and state environmental laws. See R.C. 3704.02(B) (requiring that state laws and regulations be construed “consistent[ly] with the federal Clean Air Act”); see also 42 U.S.C. § 7410(a) (requiring “each state” to adopt a plan providing “for implementation, maintenance, and enforcement” of federal standards). It helps the State carry out its duty to enforce federal standards on new sources under the authority the U.S. EPA has delegated to it. See 42 U.S.C. § 7411(C); 49 F.R. 28708. And it has the added benefit of linking the maximum penalty that can be assessed under state law—“twenty-five thousand dollars for each day of each violation,” R.C. 3704.06(C)—to the maximum that can be assessed under federal law—“\$25,000[] per day of violation,” 42 U.S.C. § 7413(d)(1).

In light of this web of federal-state overlap, on top of the incorporated-by-reference federal standard, Shelly cannot escape what § 7413 and Ohio Adm. Code 3745-31-01(AAAAAA)(2)(mmm) require: The burden of disproving a continuing violation rests with the violator after the Attorney General establishes a *prima facie* case, and per-day penalties can be assessed when the violator does not meet that burden.

**3. When Congress enacted the penalty standard in 42 U.S.C. § 7413(e), later incorporated into Ohio law, it specifically rejected Shelly's position.**

Not only does the plain text of the applicable framework demonstrate that the Tenth District applied the correct standard, but the history of § 7413(e) confirms that Congress has specifically rejected Shelly's theory of penalty assessment.

In 1987, a Maryland district court adopted the same position Shelly now presses: That a failed stack test demonstrates only that a violation occurred on the day of the failed test, and that establishing a continuing violation required the enforcement agency to prove that the facility was out of compliance each and every day after the failed test. See *United States v. SCM Corp.* (D. Md. 1987), 667 F. Supp. 1110, 1123-25. Even though the enforcement agency put on evidence that the facility had failed its emissions test, the district court refused to shift the burden of proving continuous compliance to the permit violator. *Id.* at 1124.

Congress quickly responded. In 1990, Congress enacted the version of § 7413(e) now incorporated into state law. "The amendment," which gives the violator the burden of proving that its violation was not continuing in nature, "overrules" the *SCM Corp.* decision, "in which the court refused to shift to the [violator] the burden of proving compliance after the EPA established that the source was in violation of the Act." *Committee on Environment and Public Works U.S. Senate: A Legislative History of the Clean Air Act Amendments of 1990* (Lexis, Nov. 1993), 1990 CAA Leg. Hist. 8338, at \*8706. Thus, Congress has plainly rejected—and by extension, Ohio has law rejected—Shelly's proposed standard.

With this legislative background confirming § 7413's plain text, Shelly's discussion of how civil plaintiffs typically bear the burden of proof lacks force. See Apt. Br. 7-10. Shelly points out that, under both common law and most statutes, civil plaintiffs usually have the burden of proving their case by a preponderance of the evidence. *Id.* at 7-8. That is true enough, but those

generalities cannot overcome the specific burden-shifting standard established by § 7413 and incorporated into state law. Shelly has no antidote to the applicable statutory scheme and its arguments must therefore fail.

**B. The Tenth District correctly applied the penalty standard to determine that Shelly continuously violated the terms of its permits every day following the failed emissions test.**

Walking through the applicable penalty standard shows that the Tenth District got it right. First, the evidence that Shelly facilities failed their emissions tests amounted to “a prima facie showing that” Shelly was in continuing violation of its permits. See 42 U.S.C. § 7413(e)(2). See *The Timely and Appropriate (T&A) Enforcement Response to High Priority Violations (HPVs)* (“HPV Workbook”), available at <http://www.epa.gov/Compliance/resources/policies/civil/caa/stationary/hpvmanualrevised.pdf> (last visited Aug. 22, 2011) (“[V]iolations should be assumed to be continuous from the first provable date of violation until the source demonstrates compliance.”); see also *National Stack Testing Guidance*, available at <http://www.epa.gov/compliance/resources/policies/monitoring/caa/stacktesting.pdf> (last visited Aug. 22, 2011) (“[S]tack tests [are] performed to determine both initial and ongoing compliance with the requirements of the [Clean Air Act].”); *United States v. Hoge Lumber Co.* (N.D. Ohio) (“*Hoge I*”), 1997 U.S. Dist. Lexis 22359, at \*13 (finding a continuing violation under § 7413(e) based in part on un rebutted evidence that a facility failed an emissions test and did not return to compliance until a subsequent test).

Second, the Attorney General’s prima facie showing triggered the “presum[ption]” that “the days of violation” for which penalties could be assessed included both the date of the failed emissions test “and each and every day thereafter until the violator establishes that continuous compliance has been achieved,” 42 U.S.C. § 7413(e), either by passing the emissions test or by altering its permit.

Next, the burden shifted to Shelly, which could have mitigated the effect of a continuing violation by “prov[ing] by a preponderance of the evidence that there were intervening days during which no violation occurred or that the violation was not continuing in nature.” *Id.* On this front, Shelly had two options. It could have pointed to days that it did not operate its non-compliant plants after the failed tests. Or it could have identified maintenance it undertook to correct the problem, perhaps even putting on evidence that it used its own mobile stack-testing equipment to show that it returned to compliance prior to the date of the official re-test. Shelly took neither route, so the Tenth District held that “the trial court should have concluded the violation[s] continued until the subsequent stack test[s] determined the plant[s] no longer w[ere] violating the permit limitations,” and ordered the trial court to “calculate again . . . the number of days Shelly violated” its permits. App Op. ¶ 66; compare with 42 U.S.C. § 7413(e)(2).

Shelly contests the sufficiency of the Attorney General’s showing at step one, arguing that evidence of failed stack tests alone does not establish a prima facie case. Apt. Br. 13-14. But under § 7413, the Attorney General’s showing was plenty. Section 7413 requires the Attorney General to make a prima facie showing that the violation was “*likely* to have continued.” 42 U.S.C. § 7413(e)(2) (emphasis added). Contrary to Shelly’s claim, it does *not* require the Attorney General to show that the violation did, in fact, continue. That textual nuance makes a difference. It demonstrates that the State’s burden of establishing a prima facie case is not the demanding one Shelly claims, as it only requires enough evidence to show a *likelihood* that the violation was continuing.

And under that standard, evidence of failed stack tests is enough for a prima facie case. To take a simple hypothetical, suppose the Attorney General showed that a facility did not pass its test when operated at maximum capacity on Monday. Absent any evidence that the facility fixed

the problem on Monday night, it is reasonable to infer that the facility “likely” could not have passed the same test on Tuesday. See 42 U.S.C. § 7413(e)(2). The law then shifts the burden to the facility to demonstrate that it stopped the violation from continuing beyond the Monday test. *Id.* After all, the facility is in the best position to know whether it performed maintenance on Monday night, or whether it chose not to operate on Tuesday.

Because the Attorney General’s showing established a prima facie case, and because Shelly did not rebut it through one of the methods recognized by § 7413(e)(2), the Tenth District’s decision in the State’s favor fell in perfect step with the applicable burden of proof and the prescribed formula for calculating penalties.

**C. Shelly’s “normal operating conditions” defense is irrelevant to determining whether a continuing violation occurred and what penalties should be assessed.**

Unable to overcome the established method for calculating penalties, Shelly offers this Court the same unfounded defense it offered the lower courts. Shelly suggests that the evidence it presented in response to the Attorney General’s case-in-chief—evidence that the stack test is a “snap test” and does not reflect normal operating conditions—somehow suffices to defeat the fact that Shelly failed its emissions tests and was therefore out of compliance with its permits.

Shelly’s theory is not a valid legal defense. A facility either demonstrates compliance through emissions testing, or it is deemed out of compliance with its permit terms; there is no in-between. But an in-between status is just what Shelly’s “normal operations” defense tries to prove: Even if the plants do not comply with their permits when tested at their maximum, Shelly suggests, it should be possible for a plant to be “a little bit” compliant (and therefore not subject to permit-violation penalties) simply by operating at less-than-maximum capacity on subsequent days.

That position misunderstands both the applicable penalty standard and the nature of permits and emissions testing. For one thing, § 7413(e)(2) confirms that there are only two ways to mitigate the number of days a facility is penalized for a continuing violation. As described above, the facility may show that “that there were intervening days during which no violation occurred,” or it may show “that the violation was not continuing in nature.” *Id.* Shelly’s “normal operations” defense does not address either of those components. (A facility does not prove that the violation “was not continuing in nature” simply by showing that it did not always operate at maximum capacity. If a facility operating at less-than-maximum capacity is not capable of remaining within its permit when it does operate at maximum capacity, then it is violating its permit.)

There is a reason air permits—including Shelly’s permit—require testing to occur when facilities are operating at maximum capacity. Those worst-case conditions reflect *possible* emissions, and testing up to maximum capacity ensures that, on the average day, the plants will remain well within their permit terms. And when an emissions test reveals that a facility cannot comply with its permit when operating at maximum capacity, that facility is not in compliance with its permit.

Shelly’s own permits confirm as much. For each facility at issue, the air permits require that their “emissions unit[s] . . . remain in full compliance with all applicable State laws and regulations and the terms and conditions of this permit,” and specify the way in which “compliance with the emission limitations . . . shall be determined.” See, e.g., AG Supp. at 24. The permits explicitly say that Shelly must demonstrate compliance by “conduct[ing] . . . emission testing . . . while the emissions unit is operating at or near its maximum capacity.” *Id.* at 25. And if emissions testing reveals that Shelly’s plants exceed allowable limits while

operating at maximum capacity, then the plants are out of compliance with the terms of their permits and in violation of federal and state laws requiring them to abide by the permitted emissions limits.

The fact that Shelly may not have operated at maximum capacity after its failed emissions tests does not mean that it returned to compliance after failing its tests (or, for that matter, that a court cannot presume that Shelly remained out of compliance). Once testing revealed Shelly's plants exceeded their permit terms, the *only way* (short of asking Ohio EPA for a permit modification) for Shelly to demonstrate that the plants returned to compliance—and avoid the possibility of per-day penalties for continuing violations—was through the approved compliance method in their permits: “conduct[ing] . . . emission testing . . . while the emissions unit is operating at or near its maximum capacity.” See, e.g., Ex. 417 at 14.

What Shelly is asking this Court to do is nothing less than rewrite its permit—to make a judicial pronouncement that the compliance method spelled out in the permit is actually something different—a task far outside the authority of the Court. The law and logic that govern here is simple: Because the only way to demonstrate compliance is through the testing method spelled out in the permits, and because that testing requires Shelly to show compliance while operating at maximum capacity, Shelly's showing that it operated at something less than maximum capacity on a day-to-day basis gets it nowhere toward demonstrating compliance with its permits. Absent evidence that it did not operate *at all* on the days following the failed tests, or affirmative proof that its violations were not actually continuing, Shelly is unable to rebut the presumption that it violated the law.

Guidance from the federal EPA confirms that Shelly's normal operations defense has no place in continuing-violations litigation. The U.S. EPA requires that emissions tests take place at

or near maximum capacity. See *Nat'l Stack Testing Guidance*, *supra* pg. 16, at 10 (requiring facilities to test “under the most severe conditions that create the highest emissions”). And a failed emissions test demonstrates that “the facility has not demonstrated its ability to comply with the underlying requirements [of its permit] at all times.” *Id.* Under this federal guidance, how a facility operates on a day-to-day basis just does not matter when determining permit compliance.

The federal courts similarly reject Shelly’s normal operation defense. See *Hoge*, 1997 U.S. Dist. Lexis 22359, at \*13. Just as Shelly argues here, the *Hoge* defendants claimed that emission testing at maximum capacity does not depict “representative conditions,” or normal operating conditions, and therefore the facility cannot be liable for a continuing violation absent proof that a plant exceeded its limits every day after the failed test. *Id.* In dismissing that argument, the court held that conducting emissions tests at maximum capacity is entirely consistent with federal regulations and case law. *Id.*; see also *Stone Container Corp. v. U.S. Emtl. Prot. Agency* (6th Cir. 1996), 1996 U.S. App. Lexis 33268, (“history of 40 C.F.R. § 60.8(c) strongly suggests that the regulation was intended to allow the EPA to order regulated facilities to conduct performance tests at their maximum rated capacities”). Shelly offers no authority endorsing its position, save for its own notions about what the penalty standard should be, and the Attorney General is aware of none. The Court should reject its outlier position.

Finally, the practice of determining the permit holder’s compliance through maximum-capacity testing is eminently sensible. Maximum-capacity testing ensures that under all circumstances Shelly’s plants will not exceed their emissions limits and will not pose a public-safety risk. Moreover, given that facilities may operate at *varying* capacity levels over time,

testing at a maximum-capacity level is the only reasonable way to set a testing benchmark in a permit.

At bottom, Shelly's "normal operations" defense defies the terms of its permit, the applicable legal guidelines, case law, and common sense.

**D. The established penalty standard ensures that civil penalties will be applied fairly and evenhandedly.**

The framework for assessing civil penalties that the Tenth District invoked is a carefully crafted method for adjudicating continuing violations and assessing appropriate penalties. Shelly urges this Court to deviate from this well-established formula in a manner that would both undermine the statutes' well-tuned enforcement mechanisms and impose staggering burdens Ohio businesses.

**1. The well-calibrated penalty standard deters violations, encourages compliance, and imposes fair and appropriate penalties when necessary.**

Prescribed by the federal government and incorporated into State law, the established penalty standard, properly deployed by the Tenth District, is well-calibrated to ensure that civil penalties are fairly administered. The Clean Air Act and Ohio's Air Pollution Control Act mandate compliance with the terms of air permits as a method of achieving the State's air-quality goals. See 42 U.S.C. § 7401(b)(1); R.C. 3704.02(A)(1) (The goal of environmental enforcement is to "protect and enhance the quality of the state's air resources so as to promote the public health, welfare, economic vitality, and productive capacity of the people of the state."). And because every regulated business in Ohio contributes to the quality of Ohio air, every regulated business must cooperate to achieve the air quality standards set out in the NAAQS. This reality necessarily requires deterrence mechanisms, as one recalcitrant business cannot be allowed to evade the standards applicable to all other similarly situated businesses.

To that end, state and federal enforcement mechanisms work to obtain facilities' compliance with their permit limitations and to encourage facilities to remain in continuous compliance. 42 U.S.C. § 7602(k) (emission standards limit the “emissions of air pollutants on a continuous basis . . . to assure continuous emission reduction”); Ohio Adm. Code 3745-31-01(AAAAAA)(2)(nn); see also *Nat'l Stack Testing Guidance*, *supra* pg. 16, at 13 (§§ 7602(k) and 7413(e)(2) require facilities to “comply with emissions limitations and emissions standards on a continuous basis” and trigger “a presumption of continuing violations if certain conditions are met”).

These enforcement provisions are strong yet reasonable. On one hand, “[a]ny failure to demonstrate compliance through stack testing” is a serious matter that must be rectified quickly. *HPV Workbook*, *supra* pg. 16, at 4-1. So the continuing-violation presumption used by the Tenth District encourages a swift return to compliance by raising the threat of an up to \$25,000-per-day civil penalty for each day a facility operates following a failed stack test. The prospect of severe penalties gives permit holders tremendous incentive to fix the problem as soon as possible and prevent permit violations in the future.

On the other hand, the safety valve that accompanies the continuing-violation presumption provides businesses with a simple way to avoid the harsh penalties. Once a facility fails a stack test, the business can diminish the prospect of heavy fines by stopping operations at the out-of-compliance facility, resolving maintenance issues, or seeking permit modifications. That way, the facility will have evidence to later rebut the presumption that their violation was continuing in nature. Furthermore, the State considers all the circumstances when determining the size of the penalty it will seek in court, and courts similarly consider the entire picture when determining the penalty they will assess. If the permit holder documents its efforts to achieve compliance

after a failed test and Ohio EPA cannot immediately return to the site to observe a re-test, the State will take the facility's efforts into account and will not seek penalties for days after the repair was made and before the re-test occurred. And because the courts, too, will account for the facility's good-faith efforts when assessing penalties, the safety valve gives permit holders some degree of control over the total number of days they can be penalized.

**2. Shelly's penalty standard would disrupt the well-crafted penalty scheme.**

Shelly's one-day-only penalty standard, in contrast, would drain the incentive out of the civil-penalty scheme and force the State to abandon its totality-of-the-circumstances approach. Shelly's proposed rule, as the Tenth District recognized, "would allow a violator to continue the harmful conduct at least until the next stack test, knowing no penalty will be imposed for the interim violations." App. Op. ¶ 66. With such a diminished prospect of significant penalties, a violator could chalk up a failed emissions test here or there as simply a cost of doing business. Shelly's proposed rule does not provide the deterrent necessary to ensure that all businesses do their part to achieve the NAAQS.

Indeed, other courts that have considered propositions similar to what Shelly proposes have rejected them as inconsistent with the deterrent goals of environmental enforcement, and have recognized the sensibility of shifting the burden to the violator to demonstrate that its violation was not continuing in nature. See, e.g., *N.W. Env'tl Def. Ctr. v. Owens Corning Corp.* (D. Ore. 2006), 434 F. Supp. 2d 957 (rejecting argument that failing to obtain a permit before building a pollutant source subjects violators only to a one-day penalty, concluding that a one-day-only penalty standard would mean that the "a violator . . . would have little [economic] incentive to cease construction and obtain the necessary permit once the violation was discovered"); *United States v. Mac's Muffler Shop, Inc.* (N.D. Ga.), 1986 U.S. Dist. Lexis 18108, \*27 ("Elimination of the benefits of noncompliance is an essential element of the penalty, so that there is no incentive

to violate the law, and so that businesses that obey the law are not penalized by unfair competition from defendants.”); cf. *United States v. ITT Cont'l Banking Co.* (1975), 420 U.S. 223, 232 (adopting a similar standard for a violation of an FTC order).

To make matters worse, Shelly's one-day-only theory, if adopted, would affirmatively harm other businesses, if not Shelly itself. If the Court holds that a single failed stack test does not establish a presumption of a continuing violation, Ohio EPA would need to enhance its supervisory role in order to uphold its obligation to keep State emissions in check. The agency would have to consider other emission control strategies for ensuring continuing compliance. Among other things, the agency could require permit holders to install costly continuous emission monitoring equipment, or order other sampling or monitoring for each day of operation until compliance is restored. R.C. 3704.03(I); see also 40 C.F.R. § 51.100(n) (control strategies for maintaining air quality). Either option would impose a staggering financial burden on businesses.

What is more, Shelly's theory would necessarily change—to the business community's detriment—how the Ohio EPA determines what penalties to seek. With the threat of per-day penalties all but off the table, the agency would have to adopt a more stringent approach to prosecuting emissions violations. As the law currently stands, the potential for continuing-violation penalties allows the agency to achieve its deterrent goals in a manner tailored to each business: the faster the business complies, the fewer penalties it will incur. Furthermore, the agency can adjust the amount it seeks in court depending on the circumstances, calibrating its requested penalty so that it is harsh enough to deter violations, but not so harsh as to put any one particular company out of business.

But Shelly's one-day-only theory would force the Ohio EPA to adopt a one-size-fits-all approach. If the Ohio EPA can only pursue civil penalties for the one day emissions testing occurs (even though the violation may continue long after that), then the agency will have greater incentive to seek the maximum amount of penalties for each day that an unsuccessful emissions test occurs. Those maximum penalties (up to \$25,000 per violation) will be the only way to ensure that the penalty is serious enough to deter future violations, seeing how there would be no other way of urging facilities to quickly come into compliance with their permit limits.

In the final analysis, Shelly's proposal does not just fail to achieve the regulatory goals of federal and state law, but it makes bad business sense for companies like Shelly across Ohio. The Court should decline Shelly's invitation to tamper with the integrated scheme of environmental enforcement.

**Appellee Ohio Attorney General's Proposition of Law II:**

*Once a plaintiff establishes a rebuttable presumption of a continuing emission violation, the Due Process Clause requires only that the permit holder have an opportunity to rebut that presumption.*

With no statutory argument to support its case, Shelly hunts for support in the Due Process Clause. Shelly argues that the proceedings below violated its "due process right to defend itself" by failing to provide an opportunity to rebut the inference that a continuing violation occurred. Apt Br. 14. Not so. At trial, Shelly had a full and fair opportunity to respond to the allegations against it after the Attorney General presented his case. Shelly may have used that opportunity to present what was, in the end, an unsuccessful defense, but that does not mean that the proceedings violated due process. And neither did the Tenth District's decision deprive Shelly of due process. The appellate court reached a decision Shelly disagrees with, but that in itself does not add up to a constitutional claim.

**A. Shelly had an opportunity to respond to the allegations against it during trial.**

“The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.” *Mathews v. Eldridge* (1976), 424 U.S. 319, 333. (quotations and citations omitted). Shelly received just that. At trial, after the State presented evidence of a failed emissions test, Shelly—like any other defendant in any other trial—had the opportunity to respond to that evidence when it put on its case-in-chief. That is all the Due Process Clause requires.

The manner in which Shelly used that opportunity to respond is not an issue that implicates due process. To avoid the assessment of civil penalties for every day following the failed stack test, Shelly could have directed the trial court to evidence suggesting that Shelly did not operate its plants every day. But Shelly instead presented evidence to set up its “normal operations defense,” the legal theory the Tenth District ultimately rejected. Shelly argued that “only the day of the stack test should constitute a violation and warrant a fine” and pointed to evidence that “the stack test is a snap test and does not relate to day-to-day operations.” App. Op. ¶ 58. That strategy turned out to be unsuccessful. But that does not mean that Shelly did not receive due process, as “an opportunity squandered does not make out a due process claim.” *Divane v. Krull Elec. Co., Inc.* (C.A.7 1999), 194 F.3d 845, 858 (citation and internal quotations omitted).

Moreover, there is nothing unusual—or unconstitutional—about rebuttable-presumption frameworks like the one at issue here. Ohio law is filled with rebuttable presumptions that defendants must respond to in order to avoid liability. See, e.g., R.C. 1509.22(G) (when State brings an action for violation of disposal laws, “there shall be a rebuttable presumption . . . that annular disposal caused the violation” if certain conditions are met); R.C. 1514.13(B)(2) (when landowner complains of water contamination near a surface mining operation, “[a] rebuttable presumption exists that the [mining] operation” caused the contamination); R.C. 2745.01(C)

(employer's deliberate removal of a equipment safety guard "creates a rebuttable presumption that the removal . . . was committed with intent to injure"); R.C. 3772.99(F) (possession of certain gambling devices "creates a rebuttable presumption that the possessor intended to use the devices for cheating"). Burden-shifting in and of itself is a perfectly ordinary way to conduct trial proceedings, and it occurs in a wide variety of cases ranging from certain tort actions, see *Pang v. Minch* (1990), 53 Ohio St. 3d 186, 197, to Public Records Act cases, *State ex rel. Dann v. Taft*, 109 Ohio St. 3d 364, 2006-Ohio-1825, ¶ 67, to employment-discrimination claims, *McFee v. Nursing Care Mgmt. of Am.*, 126 Ohio St. 3d 183, 2010-Ohio-2744, ¶ 9.

All this goes to show that the framework Shelly opposes is a fixture in all kinds of proceedings, not an anomalous procedure that deprived Shelly of its right to present a defense.

Here, once the burden shifted to Shelly, it had the opportunity to rebut the evidence against it. The Due Process Clause does not require more.

**B. The Tenth District's decision does not violate due process.**

Lacking support for a claim that Shelly did not have an opportunity to respond at trial, Shelly takes aim at the appellate court. "The Tenth District," Shelly argues, "violated Shelly's due process rights to defend itself," by "completely bypass[ing] Shelly's compelling evidence that there were not on-going violations" at its plants, Apt Br. 17; and "establish[ing] an irrefutable presumption of violation standard." Apt. Br. 14-15. That is incorrect.

First, the Tenth District did not bypass Shelly's evidence; it found Shelly's evidence unresponsive to the applicable legal standard. The core issue in the Tenth District was whether the trial court calculated Shelly's penalty using an incorrect legal standard. See Shelly Supp. 60 (AG 10th Dist. Merits Br. 42). That issue was fundamentally a question of law, one that did not at the outset require the court to consider Shelly's evidence. Upon finding that the trial court

used the wrong legal standard, the appellate court applied the facts to the law, and considered whether the evidence Shelly presented at trial could satisfy its burden under the correct standard.

On that score, Shelly came up short. After the Tenth District rejected Shelly's legal theory—that penalties should only be assessed on the day of the failed emissions test because the “test is a snap test and does not relate to day-to-day operations,” App. Op. ¶ 58—all the evidence Shelly now insists the Tenth District ignored became irrelevant. Shelly, for instance, faults the Tenth District for bypassing its evidence that “stack tests are mere snapshots,” Apt. Br. 16, that stack tests use “worst-case conditions,” *id.*, and “that stack tests are not indicative of day-to-day operations,” *id.* at 17. But none of that evidence mattered after the Tenth District rejected Shelly's legal defense. For, as the Tenth District confirmed, after the Attorney General established that Shelly's plants failed their emissions tests (a fact that Shelly did not contest, see Shelly Supp. 9-13 (stip. 73f; 90bb; 90mm; 91q; 91s)), all that was left for Shelly to rebut was the presumption that each plant operated each day following the failed test. And finding no evidence that spoke directly to that issue, the Tenth District sent the case back to the trial court so that it could apply the correct legal standard and recalculate Shelly's penalty.

At bottom, Shelly grounds its due-process argument on a misunderstanding of both the purpose of emissions testing and the thrust of the Tenth District's holding. Shelly's permits, as described above, specify that compliance is determined through stack testing at or near each plant's maximum emissions capacity. Under U.S. EPA guidance, that means testing under conditions that demonstrate the facility is capable of operating within their permit limits “under all conditions.” *Nat'l Stack Testing Guidance*, *supra* at p. 17. The point is not to gauge whether a particular plant exceeds its emissions limits under normal working conditions; it is to determine whether the plant exceeds those emissions limits under worst-case, *but possible*, operating

conditions. If it does, the plant is noncompliant. And no amount of evidence showing that the plant does not usually operate at maximum capacity can change that finding of noncompliance. So the issue is not, as Shelly claims, that the Tenth District violated due process by failing to consider probative evidence that Shelly's plants did not operate under testing conditions every day following the failed stack tests. The issue is simply that the Tenth District found Shelly's evidence irrelevant to the ultimate legal question. Because it does not violate due process to disregard non-responsive evidence, this Court should affirm.

Second, in arguing that the Tenth District violated due process by directing the trial court "to impose penalties upon Shelly for every day subsequent to the stack test," Apt. Br. 19., Shelly overlooks the contours of the appellate court's order. The Tenth District did not simply declare the correct legal standard and dictate the amount of the penalty. Rather, it remanded the case to the trial court to "calculate again, in accordance with [its] decision, the number of days Shelly violated [its permit]." App Op. ¶ 66.

Nothing about that instruction precludes the trial court from giving Shelly the opportunity on remand to identify evidence in the record demonstrating that it did not operate its noncompliant plants each and every day following the failed emissions testing. The Attorney General will not object if Shelly, upon returning to the trial court, asks for the chance to re-examine the existing record to determine any non-operational days.<sup>2</sup> The Tenth District's opinion seems to contemplate giving Shelly just that kind of opportunity to respond, conferring on the trial court "discretion" to "impose the fine . . . it deems appropriate." App. Op. ¶ 66.

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<sup>2</sup> To be clear, if this Court affirms the decision of the Tenth District and remands the case to the trial court, the Attorney General *would* object if Shelly attempts to present evidence that it operated at less-than-maximum capacity on certain days following the failed tests and to otherwise present any evidence outside the record as it stands. As the Tenth District decided, the only remaining issue is *how many* days Shelly operated, not *how much* Shelly emitted on the days that it did operate.

That reality soundly defeats Shelly's due process claim. Even if the trial court did not give Shelly an adequate opportunity to respond the first time around (and it did), and even if the appellate court did not provide Shelly due process (and it did), Shelly will have yet another chance to contest through the record already established at trial the number of days it operated following the failed stack tests when the case returns to the trial court. At the end of the day, Shelly not only will have received adequate due process, it will receive more than what the Due Process Clause requires. Its constitutional claim must therefore fail.

### CONCLUSION

For these reasons, the Attorney General asks that the Court affirm the decision of the Tenth District and remand the case to the trial court to calculate the number of days Shelly's nonconforming plants operated after the failed stack test.

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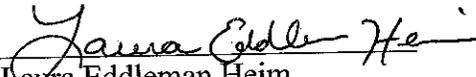
## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit Brief of Appellee Ohio Attorney General was served by U.S. mail this 24th day of August, 2011, upon the following counsel:

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