

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO ex rel.	:	CASE NO. 11-0252
OHIO ATTORNEY GENERAL,	:	
	:	On Appeal from the
Plaintiff-Appellee	:	Court of Appeals of Ohio
	:	Tenth Appellate District
v.	:	
	:	Court of Appeals
	:	Case No. 09AP-938
THE SHELLY HOLDING CO., et al.,	:	
	:	
Defendants-Appellants.	:	

**REPLY OF AMICI CURIAE, THE OHIO CHAMBER OF COMMERCE,
OHIO AGGREGATES AND INDUSTRIAL MINERALS ASSOCIATION, FLEXIBLE
PAVEMENTS, INC., OHIO COAL ASSOCIATION, OHIO CONTRACTORS
ASSOCIATION AND ASSOCIATED GENERAL CONTRACTORS OF OHIO IN
SUPPORT OF DEFENDANTS-APPELLANTS, SHELLY MATERIALS, INC. AND
ALLIED CORPORATION**

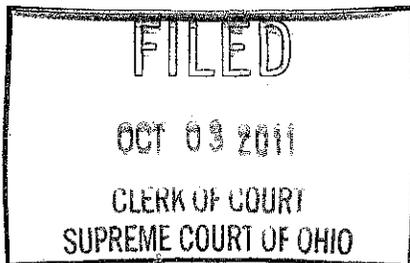
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REPLY ARGUMENT

Seventeen years ago, this Court declared that Ohio's businesses should not be subject to the "interminable task" of dealing with regulatory uncertainty in environmental regulation. *State ex rel. Celebrezze v. Natl. Lime & Stone Co.* (1994), 68 Ohio St.3d 377, 385, 627 N.E.2d 538. Today, Ohio's business community is asking this Court to reaffirm this message of regulatory clarity in two ways. First, that Ohio law requires the State to show, by a preponderance of the evidence, that a violation of law actually occurred for each day the State seeks a penalty. Second, that due process requires that a defendant in an environmental matter be given the right to present a defense to rebut the State's accusations.

Amici represents a wide range of businesses dedicated to developing and fostering prosperity in Ohio's communities while operating under complex regulatory requirements. In an economic environment of struggling businesses and job losses, Ohio EPA should not be allowed the opportunity to punish Ohio's businesses through the alteration of the civil burden of proof and the removal of a defendant's due process rights. Contrary to the State's contentions, Amici and Shelly do not advocate a "radical altering" of the law in Ohio, but instead seek a declaration from this Court that the State must meet the preponderance of the evidence burden of proof in civil enforcement actions in Ohio and allow Ohio's businesses the opportunity to defend themselves in a meaningful way.

In its Merit Brief, the State has disregarded Ohio law, changed its own previous representations and arguments before the lower courts and conjured up facts not in evidence to achieve its desired goal of collecting additional civil penalties from Shelly while, at the same time, representing to this Court that businesses should "trust" the State's benevolence and

judgment on the topic of civil penalties. In addition, the State has inappropriately decided to use scare tactics by claiming that, if Shelly wins, Ohio EPA will increase its demands for high civil penalties and saddle Ohio businesses with additional monitoring requirements. Ohio EPA's bully-on-the-playground mentality only serves to underscore the point that the State's actions here do not support an atmosphere conducive to business.

A. The State's Assumed On-Going Violation Scheme Is Detrimental To Ohio's Business Community.

In its Merit Brief, and without any support in the record, the State claims that its "assumed on-going violation standard" is well-calibrated to ensure that civil penalties are fairly administered. State's Br. at 22. The State contends, again without any support, that Shelly's position would "necessarily change – to the business community's detriment – how Ohio EPA determines what penalties to seek." *Id.* Two things are immediately clear from the State's argument. First, it is predicated on a manipulation of both the law and Shelly's argument. Second, the State is sending the business community a message - see the law our way or we will ramp up our environmental enforcement machine.

As to the first point, neither Shelly nor the Amici have ever argued that the State is limited to a "one-day-only" penalty as the State claims. State's Br. at 24. Instead, Shelly and Amici have consistently argued that Ohio law requires the State to actually prove, by a preponderance of the evidence, that an on-going violation occurred before the State can collect penalties for such violations. *Ohio Valley Radiology Assocs. v. Ohio Valley Hosp. Ass'n.* (1986), 28 Ohio St.3d 118, 122, 502 N.E.2d 599; *Cincinnati, Hamilton & Dayton Ry. v. Frye* (1909), 80 Ohio St. 289, 290, 88 N.E. 642, paragraph two of the syllabus; *Cincinnati Bar Assn. v. Young* (2000), 89 Ohio St.3d 306, 314, 731 N.E.2d 631; Shelly App. at A5 (*United States v. Peppel*

(S.D. Ohio 2008), No. 3:06cr196, 2008 WL 687125 at *4).

In fact, even if this Court applies the federal Clean Air Act's ("CAA") prima facie burden of proof standard, as the State now urges, the State still has the burden to show that the conduct or events giving rise to the violation are likely to have continued or recurred. 42 U.S.C. 7413(e). Shelly and Amici have not argued that the State is limited to only one day of violation; rather, the State here is limited by its own failure to put on any evidence "showing" that an on-going violation occurred or was likely to have continued or recurred.

Perhaps recognizing that it could not meet its burden of proof in this case under either Ohio or federal law, the State warns the Ohio business community to "see it our way or else." Specifically, the State tells this Court that if the Court accepts the State's legal theory, then Ohio EPA will be benevolent by taking the facility's compliance efforts into account and will not seek penalties for days after the repair was made, but before any retest has occurred. State's Br. at 23-26. However, if Shelly prevails, the State intends to abandon its so-called "totality of the circumstances" approach and will have a "greater incentive to seek the maximum amount of penalties." *Id.* It goes without saying that the State's role here is not to punish, but to achieve compliance. Consequently, the State's intimidation arguments are as off-putting as they are counter-productive.

While the State goes to great length explaining how, to date, it has always looked at the totality of the circumstances in determining the appropriate civil penalty to assess after a failed stack test, the State has absolutely no record to support such claims and cites to no authority. In fact, the record in this case shows just the opposite is true. For instance, while the State claims that "once a facility fails a stack test, the business can diminish the prospect of heavy fines by

*** seeking permit modifications.” State’s Br. at 23. This statement is at odds with the record in this case which shows that Shelly did exactly what the State claims it should have done to diminish the prospect of heavy fines—Shelly sought permit modifications for three of the four asphalt plants subject to this case. Shelly Supp. at 7-10 (Stipulations 63q, 63r, 63s, 73h, 90bb, 90cc, 90dd). The permit modifications raised the applicable emissions limits on the plants to the level that, had the permit modifications been in effect at the time of the initial stack test, the stack test would have been compliant. This point shows that permit limits are often set at a low level that is well beyond the level necessary to protect human health and the environment; as such, Ohio EPA is able to raise the permit limits without causing any harm. There is absolutely no evidence that the excess emissions from the Shelly plants could have endangered any citizen. Despite this, the State sought the maximum available civil penalties against Shelly. Shelly Supp. at 6 (State’s Compl., 45). Thus, the State has no credibility on this issue—it represents one thing to this Court while the record clearly demonstrates something else.

Ohio’s businesses are not intimidated by the law as it is written—if the State proves its case using the long-standing preponderance of the evidence burden of proof, then the State is entitled to on-going civil penalties. What is threatening to Ohio’s businesses is the uncertainty that would result if the Tenth District’s decision is allowed to stand. If on-going liability can be assessed based only on an inference without any evidence and the State stands ready to collect significant on-going civil penalties as a result, Ohio’s businesses will suffer.

B. Mandating Monitoring Equipment If The State Does Not Prevail Is An Inappropriate Ultimatum To Ohio’s Business Community.

In addition to threatening the imposition of maximum civil penalties if it does not prevail, the State also threatens that if Shelly prevails, “Ohio EPA would need to enhance its supervisory

role in order to uphold its obligation to keep State emissions in check.” State Br. at 25. Among the punitive measures contemplated, the State tells this Court that it “could require permit holders to install costly continuous emission monitoring equipment ****” that would “impose a staggering financial burden on businesses.” Id.

By way of background, Continuous Emission Monitoring Systems (“CEMS”) require complex equipment and computer systems designed to monitor and measure emissions on a continuing basis from only the largest air emissions sources, like power plants. Such systems can require multiple monitors at multiple exhaust points for various pollutants and involve sampling, analyzing, and recording data at varying intervals, typically every 15 minutes.

There is absolutely no record or evidence demonstrating that if this Court adopts Shelly’s First Proposition of Law, the State can keep “emissions in check” only through the use of CEMS. Similarly, the laws cited by the State in support do not stand for the proposition that Ohio EPA can only keep emissions in check by requiring CEMS. State’s Br. at 25; R.C. 3704.03(I); 40 C.F.R. 51.100(n). In fact, 40 C.F.R. 51.100(n) does not even include any reference to continuous emission monitoring, or any other form of monitoring or sampling.

For any Ohio business, and particularly for mid-sized and small businesses, the imposition of CEMS places a significant burden on businesses to hire, retain and/or train staff to run the systems and manage and report the data. Additionally, CEMS equipment has capital costs that can run in the hundreds of thousands of dollars. As the State represents to this Court, the imposition of CEMS on Ohio’s business community would “impose a staggering financial burden on business.” State’s Br. at 25.

That said, Amici are not concerned about the repercussions of Ohio EPA's intimidation tactics because the imposition of CEMS by Ohio EPA would contravene R.C. 3704.03(I)'s express requirement that Ohio EPA "shall give consideration to technical feasibility and economic reasonableness" when requiring monitoring devices. *Id.* Since the State, itself, admits that CEMS would impose a "staggering financial burden", Amici are certain that any order from Ohio EPA to install CEMS would be quickly overturned by a court. See State's Br. at 25.

C. The State's Theories Of Proving Compliance After A Failed Emissions Test Are Internally Inconsistent And Inconsistent With The Tenth District's Decision.

The Tenth District's decision was as clear as it was incorrect: once a facility fails a stack test, the Defendant is deemed to be in continued violation and subject to daily civil penalties until a subsequent stack test shows compliance. Shelly Br. App. at A34 (*State ex rel. Ohio Attorney General v. The Shelly Holding Co., et al.*, 191 Ohio App.3d 421, 2010-Ohio-6526, 946 N.E.2d 295, at ¶66). In so holding, the Tenth District unlawfully removed the due process rights of Shelly, as Defendant, to demonstrate with evidence that the on-going violation inferred did not, in fact, continue. More globally, this holding created unconstitutional black letter law that cannot stand.

There is no law or case, including 42 U.S.C. 7413, supporting the Tenth District's proposition that the "only way" to reestablish compliance after a failed stack test is by performing another stack test. In fact, even assuming 42 U.S.C. 7413 is applicable in this case, the Tenth District's holding flies in the face of both the plain language of the statute and Congressional intent underlying the CAA. In the CAA Amendments of 1990, one of the Congressional goals in adopting 42 U.S.C. 7413(e) was to clarify "that courts may consider any

evidence of violation or compliance admissible under the Federal Rules of Evidence, and that they are not limited to consideration of evidence that is based solely on the applicable test method in the State implementation or regulation.” (Emphasis added.) S.Rep. 101-228, 101st Cong. S. Rep. No. 228, 1990 U.S.C.C.A.N. 3385, 3749, 1989 WL 236970

Ironically, while the State initially claims that the Tenth District’s decision was correct, the State’s own arguments make it clear that even the State does not agree with the Tenth District. At various points in its brief, the State argues, albeit inconsistently, that there are multiple ways a defendant can prove that a stack test exceedance is not indicative of an on-going violation:

- “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.” State’s Br. at 20.
- “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.” State’s Br. at 23.
- “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 permit holders are given] some degree of control over the total number of days they can be penalized.” State’s Br. at 23-24.
- The State can require “other emission control strategies for ensuring continuing compliance”, such as “costly continuous emission monitoring equipment or order other sampling or monitoring for each day of operation until compliance is restored.” State’s Br. at 25.

Thus, throughout its brief, the State identifies at least six different ways a defendant can prove that a violation is not continuing: (1) a follow-up stack test; (2) proof that the plant did not operate; (3) maintenance activities; (4) seeking a permit modification; (5) installing continuous monitoring equipment; and (6) documenting efforts to achieve compliance. *Id.* While Amici do

not view this list as exhaustive, it is instructive to demonstrate that the State itself disagrees with the Tenth District's determination that on-going non-compliance is automatic until a follow-up stack test is performed and the results show compliance.

D. The Tenth District's Determination That A Follow-up Stack Test Is The Only Method By Which On-Going Violations Can Be Stopped Is Harmful To Ohio Business.

As explained above, while the State agrees that a defendant should be given the right to present all types of evidence that refute claims of an on-going violation, the Tenth District's decision gives a defendant no such ability. To the contrary, the Tenth District mandates a finding of on-going non-compliance until a subsequent stack test is performed. This holding not only violates the due process rights of a defendant, but is detrimental to Ohio business.

Specifically, stack testing is cost prohibitive and can run \$10,000 per test. *Gen. Elec. Lighting v. Koncelik*, 10th Dist. No. 05AP-310, 05AP-323, 2006-Ohio-1655, at ¶3. The State itself acknowledges that stack tests are expensive. State's Br. at 5. In addition, stack tests must be scheduled with Ohio EPA thirty days ahead of the scheduled test so that Ohio EPA can observe the test or the results will not be accepted. State's Br. at 5, 24. Ohio EPA also has only a "relatively small number of inspectors." State's Opening Statements, Tr. 11. The failure of a stack test by Ohio businesses is also a "fairly common event." State's 10th Dist. Reply Br. at 10.

Given these facts, it is often difficult for an Ohio business to schedule a stack test immediately following a failed stack test. This may become especially true if this Court holds in the State's favor and a business has no other way to show compliance following a failed stack test other than subsequently passing a stack test or shutting down. Ohio EPA would be besieged with requests for stack tests, potentially overwhelming the small number of inspectors the State

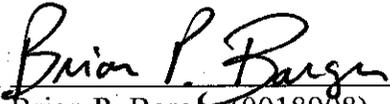
admits is available to observe these tests. If businesses are not allowed to re-test promptly, Ohio EPA puts regulated businesses in the unenviable position of either continuing to operate and risking an exorbitant civil penalty assessment or shutting down and putting Ohioans out of work. Neither is an acceptable result to the regulated community nor should it be acceptable to the State itself.

CONCLUSION

As Amici noted in its Merit Brief, the Tenth District's decision incentivizes Ohio EPA to increase enforcement actions and seek significant civil penalties against regulated businesses while essentially granting the agency, in contravention of due process guarantees, an end-run around any obligation or burden to proffer evidence of continuing violations. Now, Ohio EPA promises to increase enforcement actions and impose higher financial burdens on Ohio's businesses if it is held to the long-established preponderance of the evidence burden of proof. Contemporaneously, Ohio EPA argues that Ohio businesses should trust that the agency will act fairly and in good faith when seeking a civil penalty. However, certainty for both Ohio's business community and Ohio EPA can be restored through this Court's adoption of Shelly's First Proposition of Law, or, in the alternative, Shelly's Second Proposition of Law.

Respectfully submitted,

Brady, Coyle & Schmidt, LTD.

A handwritten signature in cursive script that reads "Brian P. Barger". The signature is written in black ink and is positioned above a horizontal line.

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PROOF OF SERVICE

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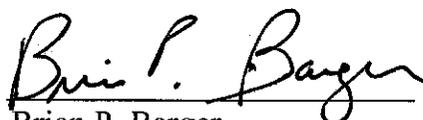
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