In the
Supreme Court of Ohio

STATE OF OHIO, ex rel. DAVE YOST,	:	Case No. 2022-0851
	:	
Plaintiff-Appellee,	:	On Appeal from the
	:	Cuyahoga County
v.	:	Court of Appeals,
	:	Eighth Appellate District
ARCO RECYCLING, INC. et al,	:	
	:	Court of Appeals
Defendant-Appellants.	:	Case No. 110703
	:	
	:	

MEMORANDUM OF PLAINTIFF-APPELLEE
STATE OF OHIO

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INTRODUCTION

George Michael Riley and his corporate alter-ego, RCI Services, LLC ("RCI") (who this brief will refer to collectively as "Riley"), created an illegal, nine-acre urban landfill that posed an extreme and substantial risk to the residents of Cuyahoga County, and which ultimately caused a large-scale civic emergency after it caught fire. Seeking to avoid the consequences of his actions, Riley asks the Court to review the civil penalties that the trial court ordered him to pay as a consequence of his illegal disposal of hundreds of thousands of cubic yards of waste in an East Cleveland residential neighborhood.

Although Riley frames his appeal as presenting an Eighth Amendment challenge, it is, in reality, a fact-specific challenge to the penalties he accrued. Between 2014 and 2016, Riley illegally dumped approximately 327,000 cubic yards of construction and demolition debris in the middle of an economically-disadvantaged East Cleveland residential neighborhood. Doing so allowed Riley to avoid the normal, high-dollar operating costs required to lawfully dispose of demolition debris. Instead, innocent people bore the real costs of Riley's illegal-dumping scheme, and Ohio's tax payers got stuck paying more than $9 million in cleanup costs. Riley's large illegal landfill negatively impacted his neighbors' quality of life for years, and became a massive blight on Northeast Ohio. The egregious harm Riley caused Ohio's citizens and its environment justified every penny of the civil penalty imposed by the trial court.

Neither the Eighth Amendment, nor the Fourteenth Amendment's Due Process Clause, calls for the Court to hold otherwise. The law governing the constitutionality of civil penalties is well settled. *See United States v. Bajakajian*, 524 U.S. 321, 336, 118 S. Ct. 2028 (1998); *State ex rel. Brown v. Dayton Malleable*, 1 Ohio St.3d 151, 158 n.5 (1982). As is the fact that someone "whose maximum penalty reaches the mesosphere only because the number of violations reaches the stratosphere can't complain about the consequences of its own extensive misconduct." *United*

States v. Dish Network L.L.C, 954 F.3d 970, 980 (7th Cir. 2020). And there can be no doubt that Riley's extensive misconduct is the reason why the penalties at issue here are so large.

Riley's appeal in this case is a last-ditch attempt to avoid the consequences of his misconduct. Because the law governing Riley's constitutional claim is well-settled, and because this case does not otherwise involve a question of public or great general interest, the Court should decline to assert jurisdiction over this case.

STATEMENT OF CASE AND RELEVANT FACTS

Riley concocted a two-part business scheme around his illegal landfill. *First*, he used his company, RCI, to obtain public contracts with the Cuyahoga County Land Bank to demolish homes. *Second*, Riley purchased a parcel of land at 1705 Noble Road in East Cleveland, Cuyahoga County, Ohio (the "Site") and used it to dispose of RCI's demolition debris. Riley then convinced his former girlfriend, Christina Beynon, who had no training or experience in the solid-waste industry, to set up ARCO Recycling, Inc. ("ARCO") in her name in order to operate the illegal landfill Site itself. Although established in Beynon's name, it was Riley himself who controlled and managed ARCO.

Riley falsely presented ARCO to the public and to regulators as a construction and demolition debris recycling facility. The evidence at trial instead showed that Riley operated ARCO as an unlicensed landfill where, beginning in June 2014, he illegally disposed of approximately 327,000 cubic yards of construction and demolition debris, an amount that could fill a football stadium 10 stories high. The debris pile towered over the homes surrounding the Site and created a long-lasting public nuisance to the East Cleveland residents.

The Ohio Environmental Protection Agency ordered ARCO to close. But that did not address the mountain of debris. As a result of Riley's disregard of Ohio law, Ohio EPA had to pay for the clean-up. Decomposing construction and demolition debris creates heat, however, which

can cause spontaneous combustion. That is what happened here. The debris pile caught fire during the Site clean-up. The fire burned for over a week and required the response of over a dozen fire departments. Ohio EPA ultimately spent over $9 million to clean up Riley's mess.

The State filed a civil enforcement complaint to address the environmental violations created by the illegal landfill. The State sought, among other relief, permanent injunctive relief under R.C. 3714.11(A) and civil penalties of up to $10,000 per day for each day of violation, as specifically authorized by R.C. 3714.11(B). The State also sought reimbursement of the approximately $9 million incurred by Ohio EPA to clean up the Site and other extraordinary litigation and enforcement costs.

During the nearly three years this case remained before the trial court, at no time did Riley respond to any of the State's discovery requests. In 2019, Riley informed the State that he did not intend to call any witnesses at trial. The State filed a motion *in limine* shortly before a scheduled February 2020 trial date seeking to preclude Riley from calling any witnesses or presenting any evidence due to his failure to provide discovery. Riley did not respond and the trial court granted the State's motion. It precluded Riley from presenting any witnesses at trial other than himself, and precluded him from presenting any evidence or testimony in support of a reduced ability-to-pay defense. It was not until seven days before the May 2021 trial that Riley presented the State with an after-the-fact list of witnesses that he then intended to call, had he been allowed.

As for Riley's business, RCI, the trial court granted default judgment against RCI as to liability. It entered a supplemental consent order resolving the State's claims against Beynon, ARCO, and 1705 Noble Road Properties, LLC (another company that Riley set up in Beynon's name, but which he used to purchase the Site and which he controlled and managed himself).

During a three-day bench trial in May 2021, the State presented its case to determine

liability against Riley, and civil penalties for RCI and Riley. The trial court found that Riley operated ARCO as an unlicensed construction and demolition debris facility. The trial court also found that both Riley and RCI illegally disposed of construction and demolition debris and created a public nuisance. The court concluded that the evidence warranted the maximum statutory penalty of $10,000 per day of violation, totaling approximately $21 million ($13.68 million against Riley and RCI, jointly and severally, and an additional $7.71 million against Riley). The trial court also ordered Riley and RCI to pay approximately $9 million, jointly and severally, in restitution to Ohio EPA for the Site clean-up. *State ex. rel. DeWine v. ARCO,* Cuyahoga C.P. No. CV-17-881301 (June 29, 2021) (hereafter "Tr. Ct. Decision").

On direct appeal, the Eighth District affirmed the trial court's judgment as to both liability and civil penalties. *State ex rel. DeWine v. ARCO Recycling, Inc.,* 8th Dist. Cuyahoga No. 110703, 2022-Ohio-1758. It held that the trial court did not abuse its discretion in awarding civil penalties, *id.* at ¶ 87, and that the harm Riley caused "is the very sort of unmitigated environmental disaster that caused President [Nixon] to create the Environmental Protection Agency," *id.* at ¶ 83.

THIS IS NOT A CASE OF GREAT PUBLIC OR GENERAL INTEREST

This is a fact-bound case. The large penalties in this case resulted from Riley's even larger violations of Ohio's environmental laws. Operating as ARCO, Riley ran an illegal 9-acre East Cleveland landfill that accumulated so much waste between 2014 and 2016 that it literally cast a shadow over neighboring homes—and eventually caught fire in October 2017. It took a week to extinguish the ensuing blaze, and the firefighting effort required so much water that it compromised water pressure across portions of eastern Cuyahoga County. Contaminated firefighting water threatened to overwhelm combined sewer drains and overflow into nearby Lake Erie. Extinguishing the massive fire required authorities to shut down Euclid Avenue (U.S. Route 20), and pulled from the combined resources of over a dozen northeast Ohio fire departments,

some from as far away as Youngstown. Ohio taxpayers ended up having pay to over $9 million to remove and properly dispose of Riley's illegal landfill.

Against these facts, Riley now asks this Court to accept jurisdiction and to hold that the civil penalties that the trial court imposed in this case violate the Eighth Amendment's Excessive Fines Clause and the Fourteenth Amendment's Due Process Clause. Though couched in constitutional language, Riley's appeal involves little more than a fact-driven dispute in which both the facts and the law strongly support the trial court's judgment. Riley argues, for example, that he was denied access to the illegal landfill starting in August 2016. *See* Jur.Mem. 9, 15. But even if true, that is of little relevance. Riley's illegal disposal of debris began well before that date. And even if he could not access the site personally, there was nothing stopping him from hiring others to remediate the environmental disaster that he caused. Riley also complains that he was limited in what evidence he could offer at trial. *See* Jur.Mem. 10, 13–14. But what he fails to mention is that any limitations on his ability to present evidence were sanctions that were imposed because of his failure to comply with his discovery obligations.

As Riley's argument should make clear, his complaints are factual ones. Whether the trial court properly barred evidence of Riley's ability to pay, *see* Jur.Mem. 13, and whether he could be held responsible for cleaning up the site even after he was barred from visiting the site personally, *see* Jur.Mem. 15, are case-specific questions of little interest to litigants in other cases.

To the extent that this case does present any legal questions, those questions have already been answered by settled precedent. The United States Supreme Court has held, for example, that a fine that falls within the amount prescribed by the legislature enjoys a strong presumption of constitutionality. *United States v. Bajakajian*, 524 U.S. 321, 336, 118 S. Ct. 2028 (1998); *see also Newell Recycling Co. v. United States EPA,* 231 F.3d 204, 210 (5th.Cir. 2000) ("[I]f the fine does

not exceed the limits prescribed by the statute authorizing it, the fine does not violate the Eighth Amendment"). Consistent with that holding, courts have concluded that statutory penalties typically do not raise due process concerns because such penalties "are identified and constrained by the authorizing statute." *Capitol Records Inc. v. Thomas-Rasset*, 692 F.3d 899, 907 (8th Cir. 2012). Thus, to the extent that Riley's appeal *does* raise any legal questions, all of those questions have already been answered.

Riley blurs his constitutional claims together and does not clearly articulate what specific violations he thinks occurred. *See* Jur.Mem. 13–15. Charitably construed, Riley's appeal asks whether the court decisions below were consistent with settled Eighth Amendment and due process precedent. He asks, in other words, for the Court to correct the lower court's alleged errors. But this is not an error-correction court. Even if it were, there is nothing to correct. The trial court carefully and appropriately weighed the evidence and found that the civil penalties and restitution in this case were a proper application of Ohio law. The Eighth District correctly held that the trial court did not abuse its discretion in doing so. *ARCO, supra,* at ¶ 87. The civil penalties fell within the range determined by the Ohio General Assembly for the statutory violations in this case. The penalties and restitution were not grossly disproportionate to the massive harm Riley caused to the Northeast Ohio community and the environment. As such, those penalties do not violate the Eighth Amendment's Excessive Fines clause.

Finally, it is worth noting that, for all of his complaints, the only thing that Riley *actually* asks this Court to review is the scope of the civil penalty. He does not challenge the trial court's findings of liability, its discovery sanctions, or its evidentiary rulings (including its ruling on the motion *in limine*)—all of which the Eighth District affirmed. *State ex rel. DeWine v. ARCO Recycling, Inc.*, 2022-Ohio-1758 (8th Dist.). So even though Riley's complaints might be broad,

the question that is actually before the Court is narrow and not worthy of review.

LAW AND ARGUMENT

Appellee's Proposition of Law:

> **Civil penalties for environmental violations that fall within an amount specified by the Ohio General Assembly do not violate the U.S Constitution's Eighth Amendment Excessive Fines clause or the Fourteenth Amendment's Due Process Clause.**

Riley challenges the civil penalties and restitution imposed in this case, claiming them to be grossly disproportionate in violation of the Eighth Amendment and Fourteenth Amendments to the U.S. Constitution. (Riley also asserts a violation of the Equal Protection Clause, but offers no substantive argument on that point. He does not contend that he is a member of a protected class or present a credible claim that he has been treated differently than similarly-situated individuals.)

He is wrong. First, the civil penalties and restitution do not implicate the Eighth Amendment's excessive fines clause, as civil penalties imposed for violations of environmental laws in Ohio are remedial rather than punitive. Second, the trial court properly weighed the requisite factors related to Riley's illegal operations and imposed a civil penalty within the statutory directive. Third, even if the Eighth Amended applied here, the civil penalties and restitution were not grossly disproportionate to the massive harm that Riley's violations caused Northeast Ohio's residents and the environment, and therefore were not unconstitutional under an Eighth Amendment analysis. Finally, Riley failed to comply with App. R. 16(A)(7) and did not properly present a due process claim before the Eighth District, thereby waiving it for purposes of appeal to this Court. In any event, however, the claim lacks merit because Riley received proper notice of the statutory civil penalties, in compliance with the requirements of due process.

1. The civil penalties and restitution costs imposed do not implicate the Eighth Amendment because their purpose is remedial rather than punitive.

This court specifically declined to apply the Eighth Amendment's Excessive Fines Clause

to civil penalties imposed for violations of Ohio's environmental laws in *State ex rel. Brown v. Dayton Malleable,* 1 Ohio St.3d 151, 158 n.5 (1982). The concurring Justices there observed that the purpose of the civil penalties was remedial, rather than punitive, as they were designed "'to produce obedience to environmental laws.'" *Id.* at 160, Holmes, J., concurring in part and dissenting in part. (Citation omitted.)

To determine whether a fine is punitive or remedial, courts must determine whether the fine constitutes payment to a sovereign "'as *punishment* for some offense.'" *Austin v. United States*, 509 U.S. 602, 610, 113 S. Ct. 2801 (1993)(citation omitted and emphasis in original). If one of the goals of a fine is to punish, then the fine is subject to Eighth Amendment scrutiny. *Id.* A punitive fine violates the Excessive Fines Clause if it is *grossly disproportionate* to the gravity of a defendant's offense. *Bajakajian*, supra, 524 U.S. at 334. There is, however, a strong presumption that a fine is not unconstitutionally excessive if it lies within the range of fines prescribed by the legislature. *Id.* at 336.

In this case, the $9 million in restitution, which the trial court imposed to reimburse the State's debris removal and disposal costs, is indisputably remedial rather than punitive. Even assuming, *for the sake of argument*, that the Eighth Amendment's grossly disproportionate analysis applies to the remaining $7,710,000 penalty for operating an unlicensed facility and the $13,680,000 penalty for illegal disposal of construction and demolition debris, Riley cannot show that the civil penalties and restitution are unconstitutionally excessive.

2. The civil penalties were not grossly disproportionate to Riley's violations and the resulting harm.

Assuming that the Eighth Amendment analysis does apply to civil penalties for environmental violations in Ohio, this Court should reject Riley's invitation to hear this case because the trial court appropriately weighed all applicable factors and the civil penalties were not

grossly disproportionate to the gravity of Riley's conduct and its resulting harm.

In *Bajakajian,* the Supreme Court announced two key principles to guide courts when considering whether a fine is grossly disproportional under the Excessive Fines clause. "[J]udgments about the appropriate punishments for an offense belong in the first instance in the legislature. * * * The second is that any judicial determination regarding the gravity of a particular offense will be inherently imprecise." *Id.* at 336 (citations omitted). Because both of these factors "counsel against requiring strict proportionality between the amount of a punitive forfeiture and the gravity of a[n] * * * offense," a civil penalty should not be found unconstitutional unless "it is grossly disproportional to the gravity" of the offense. *Id.* at 336-7.

a. Ohio's *Dayton Malleable* factors for assessing civil penalties for environmental violations is both coextensive with—and more rigorous than—the Eighth Amendment grossly-disproportionate test.

In Ohio, courts have adopted a comprehensive, four-part test to determine the appropriate amount of a civil penalty for environmental violations, which the State submits is both coextensive with—and actually more rigorous than—the *Bajakajian* grossly-disproportionate test. In assessing civil penalties for environmental violations, Ohio courts must use their informed discretion to impose a civil penalty to 1) redress the harm or risk of harm posed to public health or the environment by the violations at issue; 2) remove the economic benefit gained by the violations; 3) penalize the level of recalcitrance, defiance, or indifference demonstrated by the violator of the law; and 4) address the extraordinary costs incurred by the State of Ohio. *State ex rel. Brown v. Dayton Malleable, Inc.*, 2d Dist. Montgomery No. 6722, 1981 Ohio App. LEXIS 12103, *8-9 (Apr. 21, 1981), affirmed in part, reversed in part on other grounds, 1 Ohio St.3d 151, 158, 438 N.E.2d 120 (1982); upheld in *State ex rel. Ohio Attorney General v. Shelly Holding Co.*, 135 Ohio St.3d 65, 2012-Ohio-5700, 984 N.E.2d 996, ¶ 23.

Because of the mandatory nature of civil penalties under R.C. Chapter 3714, a trial court's discretion lies in determining *how much* civil penalty is imposed and *not whether* to impose a civil penalty. *See State v. Tri-State Group, Inc.*, 7th Dist. Belmont No. 03-BE-61, 2004-Ohio-4441 ¶ 103. A trial court has broad discretion to determine the amount of that penalty. *Id*., citing *Dayton Malleable*, 1 Ohio St.3d at 157. *See also Shelly Holding Co.*, at ¶ 23.

Again, the trial court's reliance on the *Dayton Malleable* test to arrive at an appropriate civil penalty achieves a result that complies with *Bajakajian's* grossly-disproportionate test. In a criminal case involving the Excessive Fines clause, this Court discussed several factors courts may consider to determine whether a financial penalty was grossly disproportionate. *State v. Hill,* 70 Ohio St.3d 25, 635 N.E.2d 1248 (1994). The analysis "'must necessarily accommodate the facts of the case and weigh the seriousness of the offense, including the moral gravity of the crime measured in terms of the magnitude and nature of its harmful reach, against the severity of the * * * sanction.'" *Id.* at 33 (citation omitted). These factors, requiring examination of the moral gravity of harm caused by the violation, mirror the key aspects of the four-part *Dayton Malleable* test. In particular, *Dayton Malleable* also requires examination of the harm and risk of harm to human health and the environment, the economic benefit received from the illegal conduct, and the extraordinary costs borne by the State. *Dayton Malleable, supra,* at *8.

b. Under the *Dayton Malleable* factors, the civil penalties and restitution imposed in this case were lawful and reasonable.

Riley's argument that "there was no proportionality review undertaken" is misplaced. Jur.Mem. 4. The evidence strongly supports the trial court's determination as to each of the *Dayton Malleable* civil penalty factors. With regard to the first factor, the trial court found that Riley caused "extreme risk of harm, both severe and imminent, to the public and to the environment." Tr. Ct. Decision at 21. The trial court explained that Riley's "accumulation of construction and

demolition debris created a severe and imminent risk of harmful toxins and carcinogenic agents—such as arsenic, lead, DDT and asbestos—leaching into ground and surface water." *Id.* In addition, the citizens of East Cleveland were forced to breathe the harmful dust and to live with the loud noises, odors, and unsightly nature of Riley's illegal and massive debris pile, which towered above their homes. *Id.* at 19, 21. The trial court also found that Riley's "illegal dumping and failure to remove the debris created the conditions that caused a fire to erupt at the site in October 2017." *Id.* In agreeing with the trial court's conclusion that Riley caused an "'extreme risk of harm,'" the Eighth District described the Site as an "unmitigated environmental disaster." *State ex rel. DeWine v. ARCO Recycling, Inc., et al.*, 2022-Ohio-1758, ¶ 83.

Second, the evidence at trial supports the trial court's finding that Riley, through his illegal dumping and operation of an unlicensed landfill, gained a substantial economic benefit from the violations. Tr. Ct. Decision, 21-22. While the precise amount that a violator gained from his defiance of the law may not be quantifiable, a trial court does not abuse its discretion by deducing an economic benefit from environmental violations. *Tri-State Group*, 2004-Ohio-4441 at ¶ 112-114. But here the economic benefit was crystal clear: Riley avoided the costs normally incurred by the operator of a licensed landfill. Tr. Ct. Decision 21-22. To obtain a landfill license, the owner or operator must comply with various facility design requirements and submit a detailed site characterization report that addresses, among other things, soil liner requirements, ground water monitoring, and supporting hydrological information. Tr. 237-40. The trial court heard testimony that these initial costs for a small five-acre landfill range from $320,000 to $420,000, depending on local geological, hydrogeological, and soil conditions, and an operator can spend as $500,000 before accepting its first load of construction and demolition debris for disposal. Tr. 239

As the operator of RCI, Riley received payments from the Cuyahoga County Land Bank

to demolish homes. Tr. 58. Then, by taking the debris to his own, unlicensed facility (ARCO), Riley avoided the disposal fees that other law-abiding demolition companies would have paid to a properly-licensed disposal facility. Tr. Ct. Decision, at 22. As a result, Ohio EPA was forced to incur the cost of the clean-up work (using taxpayer funds) that Riley had avoided. Ex. 30; Tr. 547-49. The final cost of removal was to $9,143,860.47. Tr. 547, 579; Ex 35.

Under long-standing Ohio law, the civil penalty must be larger than the cost to remedy the problem caused by the violators. "[B]ecause the function of a monetary penalty is to deter the polluting activity altogether and thus not give rise to the penalty at all, the amount of the penalty must be greater than abatement or compliance costs. [citation omitted]." *Dayton Malleable, Inc*., 1 Ohio St.3d at 157, upheld in *State ex rel. Ohio AG v. Shelly Holding Co*., 135 Ohio St.3d 65, 71, 2012-Ohio-5700, 984 N.E.2d 996.

Third, the trial court specifically found that Riley's "blatant recalcitrance warrant[ed] the imposition of the maximum statutory penalty" because "Riley knowingly and personally deposited well over 200,000 cubic yards of waste in a residential East Cleveland neighborhood while profiting and thwarting all regulatory enforcement." Tr. Ct. Decision at 22. Ohio EPA sent numerous letters directly to Riley documenting his failure to comply with the laws governing the disposal and recycling of constructions debris. Ex. 20; Ex. 21. Although Ohio EPA inspectors and other ARCO employees conveyed their concerns to Riley, the pile did not get any smaller. Tr. 385, 440-43. While ARCO's neighbors protested against the facility, Riley dismissed their concerns and used racial epithets to express his disdain for them. Tr. 75-76; 443-44. The evidence amply supports the trial court's finding that Riley's blatant recalcitrance and callous disregard for the public health justified the maximum statutory civil penalty. Tr. Ct. Decision, 22.

Riley's conduct is all the more egregious considering that the law is designed to encourage

compliance and prevent pollution. A "central purpose of the OEPA is to remedy environmental hazards *before* they manifest public health issues–not after." *Ohio v. Breen,* S.D. Ohio No. 2:16-cv-802, 2022 U.S. Dist. LEXIS 120461, *30, fn. 10 (July 7, 2022) (emphasis in the original). Ohio's environmental laws are thus designed to avoid litigation through self-policing, and should that fail, then through working cooperatively with Ohio EPA. *See State ex rel. DeWine v. Deer Lake Mobile Park, Inc.*, 2015-Ohio-1060, 29 N.E.3d 35, ¶ 48 (11th Dist.). That didn't occur here.

Finally, Riley caused the State to incur substantial, extraordinary costs. The $9 million in clean-up costs did not include the millions of gallons of water used to extinguish the fire or the hundreds of hours of labor expended by employees of the Ohio EPA, the Board of Health, and numerous local and federal agencies to mitigate the resulting harms. Tr. Ct. Decision, at 23. Riley's lawbreaking created an emergency throughout Northeast Ohio. He passed the resulting costs to Ohio taxpayers, numerous government agencies, nearby homeowners, and businesses. *Id.*

The trial court correctly found that Riley continued to violate the illegal disposal laws until others cleaned up the mess he left behind. *Id.* at 24-25. Accepting Riley's argument that these penalties are grossly disproportionate to his illegal conduct would drain the incentive out of the civil-penalty scheme by allowing violators to abandon the site after disposing of large quantities of debris and to incur only a minimal penalty as simply a cost of doing business. *See State ex rel. Ohio Attorney General v. Shelly Holding Co.*, 191 Ohio App.3d 421, 2010-Ohio-6526, 946 N.E.2d 295, ¶ 66 (10th Dist.).

As part of his effort to convince this Court to take this case, Riley points to events derivative to his relationship with Ms. Beynon that are unrelated to his excessive-fine claim. First, the trial court's civil penalty was lawful and well within the court's discretion, despite Riley's misleading claim that he had been "banished" from the site. Tr. Ct. Decision, 9-10. The trial court specifically

noted that Riley's exclusion from the Site was due to "Riley's aggressive and threatening behavior toward [Ms. Beynon] and her children," which resulted in the Summit County Domestic Relations Court issuing a civil protection order prohibiting Riley from coming within 500 feet of Ms. Beynon or entering her place of employment. *Id.* Riley's Civil Protection Order did not change the fact that he caused—and failed to remediate—the environmental disaster at the Site, or relieve him of his obligation to clean up the mess he left behind. Similarly, the fact Ms. Beynon received a smaller civil penalty does not mean that Riley's penalty is improper, as the trial court has sound discretion to impose civil penalties based on all pertinent facts. *Ohio Attorney General v. Shelly Holding Co.*, *supra*, ¶ 23. *see also*, trial Court's June 19, 2020 Supplemental Consent Order, 6 (Ms. Beynon's civil penalty was the result of an agreed consent order and was based upon an analysis of her demonstrated financial condition and her cooperation with Ohio EPA during the clean-up and fire).

In sum, the trial court properly weighed the gravity of Riley's offenses according to the *Dayton Malleable* factors, acted within its discretion pursuant to this Court's holding in *Ohio Attorney General v. Shelly Holding Co.*, *supra*, ¶ 23, and appropriately imposed the maximum statutory civil penalty as authorized by Ohio General Assembly in R.C. 3714.11(B), which carries the strong presumption of constitutionality under *Bajakajian.*

3. Even if he had not waived it by failing to properly present it below, Riley's Due Process claim lacks merit.

Riley also contends that his civil penalties violate the Fourteenth Amendment's Due Process Clause. Riley, however, failed to properly brief this issue before the Eighth District and therefore waived it for purposes of review. *See Deutsche Bank Natl. Trust Co. v. Najar,* 8th Dist. Cuyahoga No. 98502, 2013-Ohio-1657, ¶ 76 (holding that a court may disregard an assignment of error where it has not been separately argued in the brief as required by App.R. 16(A)(7)).

Nevertheless, Riley's argument still lacks merit. The Due Process Clause requires that "a

person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW of N. Am. v. Gore*, 517 U.S. 559, 574 (1996). A defendant receives that notice, however, when a statute identifies a maximum authorized penalty. *See Pharaon v. Board of Governors of the Fed. Reserve Sys.*, 135 F. 3d. 148, 157 (D.C. Cir, 1998) (because the statute provided for a maximum penalty and "because the assessed penalty [fell] far below the statutory maximum," a defendant could not claim that he lacked constitutionally required notice) (internal citations omitted). In such cases the statute itself provides the required notice, leading courts to conclude that due process concerns do not apply "to statutory damages, because those damages are identified and constrained by the authorizing statute." *Capitol Records Inc. v. Thomas-Rasset,* 692 F.3d 899, 907 (8th Cir. 2012). Here, Riley received proper notice of the statutory penalties and there was no Due Process violation.

CONCLUSION

To accept Riley's proposition that he should not be required to pay the civil penalty—despite his unchallenged liability for years of environmental violations—speaks to the heart of what he really wants: to avoid any consequences for his actions. This result is contrary R.C. 3714.11, established case law, and the public interest. Because the trial court acted within its discretion and the bounds of the Ohio Revised Code and U.S. Constitution, this case does not warrant this Court's review. For these reasons, Appellee the State of Ohio respectfully urges the Court to deny jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum of Plaintiff-Appellee State of Ohio Opposing Jurisdiction was served via electronic mail and ordinary mail this 9th day of August, 2022, upon the following counsel:

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