In the

Supreme Court of Ohio

NORTHEAST OHIO REGIONAL SEWER DISTRICT,	:	Case No. 2013-1770
	:	
	:	On Appeal from the
Appellant,	:	Cuyahoga County
	:	Court of Appeals,
v.	:	Eighth District
	:	
BATH TOWNSHIP, OHIO, et al.,	:	Court of Appeals
	:	Case No. CA-12-098728
Appellees.	:	(Consolidated with Case Nos.
	:	CA-12-098729 & CA-12-098739)

MERIT BRIEF OF *AMICUS CURIAE* STATE OF OHIO IN SUPPORT OF APPELLANT NORTHEAST OHIO REGIONAL SEWER DISTRICT

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TABLE OF CONTENTS

Page

TABLE OF AUITHORITIES

Cases **Page(s)**

Statutes, Rules, and Constitutional Provisions

Other Authorities

INTRODUCTION

Environmental policies and options for implementing those policies can be among the most challenging topics in law. Those policy choices involve every level and every branch of government. One policy choice the Ohio General Assembly made long ago was to enable political subdivisions to create a new kind of subdivision dedicated to managing regional water issues. These entities, Regional Water and Sewer Districts, are empowered, among other things, to construct, improve, and operate "water resource projects." R.C. 6119.06(G). Those projects include "water management facilities" (such as "facilities for water supply") and "waste water facilities" (such as "storm and sanitary sewers"). R.C. 6119.011(G), (L), (M).

Here, several political subdivisions covered by the Northeast Ohio Regional Sewer District ("the District") challenge the District's authority to establish a storm-water plan to regulate uncontaminated storm water. After extended proceedings, the common pleas court held that the District is so empowered. A divided Eighth District disagreed and reversed. The majority of that panel rested its decision on an unsupportable reading of the relevant statutes—one that, if allowed to stand, could negatively affect this State's environment. Because the Eighth District's decision upsets the General Assembly's policy choice about a complex environmental problem, the State writes as *amicus* urging the Court to reverse the Eighth District on its interpretation of the relevant statutes.

The Eighth District's judgment misinterpreted the relevant statutes by concluding that the definition of "waste water"—i.e., the water that falls within the regulatory purview of Regional Water and Sewer Districts—excludes uncontaminated storm water. That interpretation runs contrary to the text and structure of the governing statutes. It also runs contrary to common sense. Under the Eighth District's interpretation of "waste water," districts could not manage either contaminated water or storm water alone, but could only manage water when both

contaminated water and storm water are combined. Or as the dissent put it, the District may only manage sewage when it is raining. *See Ne. Ohio Reg'l Sewer Dist. v. Bath Twp.*, 2013-Ohio-4186, 999 N.E.2d 181 ¶ 94 (8th Dist.) (Jones, J., dissenting) (hereafter "App. Op.").

The Court should reverse the judgment of the Eighth District Court of Appeals and confirm the District's statutory authority to implement its storm-water plan.

STATEMENT OF *AMICUS* INTEREST

The State has two distinct interests in the correct resolution of this case. First, the State has an interest in ensuring that policy choices made by the Ohio General Assembly are not scuttled by judicial action unmoored from statutory text. The judiciary has a role in environmental regulation, and in Chapter 6119 in particular. But as to the question here, that role means applying the plain text of the General Assembly's work, not second-guessing the General Assembly's choices to repose in regional districts the authority to manage storm water in addition to sewage. Second, the State, as a party to a federal consent decree that also includes the District as a party, has an interest in ensuring the continued viability of that agreed judgment. If the Eighth District decision stands, the District will face conflicting demands from the federal and state courts. That is antithetical to the agreed resolution of certain environmental claims that all thought were resolved by the decree.

STATEMENT OF THE CASE AND FACTS

A. Revised Code Chapter 6119 confers authority on regional districts to manage storm and waste water.

The Northeast Ohio Regional Sewer District is one of more than thirty Chapter 6119 districts created to provide water, and to collect, treat, and dispose of waste water for Ohioans. *See* R.C. 6119.01. It has local member communities in Cuyahoga, Summit, Lorain, and Lake Counties. App. Op. ¶ 8. The District was established in 1972 to "plan, finance, construct,

operate and control waste water treatment disposal facilities, . . . all sewer regulator systems, . . . storm water handling facilities, and all other water pollution control facilities of the District." Northeastern Ohio Regional Sewer District, Plan for Operation of the District ¶ 5(c). In 2010, the District amended its regulations to add Title V. *See* App. Op. ¶ 13. Title V requires the District to plan, construct, maintain, operate, and regulate "the proper handling of storm-water runoff and the development and provision of technical support information and services to Member Communities." Title V, 5.0501.

Districts like the Northeast Ohio Regional Sewer District are formed when a group of communities decides to join together to collectively address problems related to waste water or water supply. Revised Code Chapter 6119 establishes a rigorous process that such communities must follow. Only member communities that consent may join a regional water and sewer district—no local entity may be forced into a district. R.C. 6119.02(A); *City of Seven Hills v. City of Cleveland*, 1 Ohio App. 3d 84, 90 (8th Dist. 1980) (under R.C. Chapter 6119, a regional water and sewer district cannot compel a city to submit to its authority absent the city's consent). Water and sewer districts are formed after a hearing before a common pleas court at which any objections may be aired by anyone residing in the proposed district or any public subdivision situated within the proposed district. To establish a district, a common pleas court must find that the "proposed district is necessary, that it and the plan for the operation of the district are conducive to the public health, safety, convenience, and welfare, and that the plan for the operation is economical, feasible, fair, and reasonable." R.C. 6119.04(D).

B. The Common Pleas Court held that the storm-water plan was a legitimate exercise of the District's statutory authority, but the Eighth District reversed and held that the plan was not authorized by Chapter 6119.

Anticipating a legal challenge to its storm-water plan, the District filed a declaratory action naming its 56 constituent communities in the Cuyahoga County Court of Common Pleas.

App. Op. ¶ 24. The District asked the trial court to decide whether the District had the authority to manage storm water. *Id.* Some communities objected to the plan; many other communities agreed with the plan, and did not object. Several property owners successfully intervened and joined the objecting communities in opposing the storm-water plan. *Id.* ¶¶ 25-26. Ultimately, the trial court granted partial summary judgment to the District and held that R.C. Chapter 6119 authorized the District's plan to regulate storm water under Title V. *Id.* ¶ 29. After a bench trial, the common pleas court further held that the fee imposed by the District was authorized by Chapter 6119 and did not violate the Ohio Constitution. *Id.* ¶ 30.

The objecting local communities appealed, arguing, among other things, that the District lacked authority under R.C. Chapter 6119 to enact the storm-water plan. *Id.* ¶ 35. The Eighth District Court of Appeals reversed the judgment in favor of the District, held that it had no authority to implement the storm-water plan, and entered judgment enjoining the District from implementing the plan. *Id.* ¶ 82. Key to that judgment was the majority's interpretation of "waste water" in R.C. Chapter 6119.011(K). The majority read that term to include only *contaminated* storm water, and to exclude storm water that is not mixed with contaminants (or, conversely, sewage that is not mixed with storm water). *Id.* ¶ 44. The Eighth District's judgment effectively bars the District from implementing the storm-water plan. *Id.* ¶ 82.

Judge Jones dissented and interpreted "waste water" to include storm water, whether or not it is mixed with other contaminants. *Id.* ¶¶ 93-94. The dissent highlighted that, under the majority's reading, waste water is neither storm water nor contaminated water alone; waste water must be the *mixture* of storm water and contaminated water. *Id.* ¶¶ 91, 94.

The District timely appealed and this Court granted jurisdiction to determine, among other questions, whether the definition of "waste water" in R.C. Chapter 6119 includes uncontaminated storm water.

ARGUMENT

Amicus Curiae State of Ohio's Proposition of Law:

> *A regional district established pursuant to R.C. Chapter 6119 may manage storm water, whether combined with pollutants or not, and may establish a regional storm-water plan.*

The plain language of R.C. 6119.011(K) demonstrates that storm water, contaminated water, and any mixture of the two are included in the definition of "waste water." *See* R.C. 6119.011(K). That reading is confirmed by other portions of Chapter 6119. And the contrary reading of the Eighth District leads to the absurd result that storm water and contaminated water must be *combined* before water constitutes "waste water." That reading also results in the absurdity of declaring illegal those Chapter 6119 districts that handle only uncontaminated storm water. The Eighth District's contrary and non-textual reasons for its statutory reading do not address or rebut the plain text and other indicia of the statute's meaning.

A. The plain text of R.C. 6119.011(K) indicates that both storm water and water containing pollutants are two separate types of "waste water" over which Chapter 6119 districts have regulatory authority.

Chapter 6119 districts have the authority to manage "waste water," which includes both storm water and contaminated water whether combined or separate. The General Assembly has defined "waste water" as "any storm water and any water containing sewage or industrial waste or other pollutants or contaminants derived from the prior use of the water." R.C. 6119.011(K). A natural and logical reading of the text is that "waste water" is "storm water *and* any water containing" contaminants—that is, the definition includes *both* types of water, and either type of water alone constitutes waste water. *See* App. Op. ¶ 93 (Jones, J. dissenting) ("waste water" may

be either "(1) 'any storm water' or (2) 'any water containing sewage or industrial waste or other pollutants or contaminants derived from the prior use of the water.'").

This manner of defining a term is not unusual. For example, under federal employment discrimination law, the definition of "employer" includes a "State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency . . . ." 29 U.S.C. § 630(b). Much like the definition of "waste water" under R.C. Chapter 6119, this federal statute defines "employer" to mean "[A], and any [B], and any [C]." Under the federal law it would be impossible for an employer to satisfy *each* of the terms—practically no employer would be a State or political subdivision of a state and an agency of one of those and an interstate agency. 29 U.S.C. § 630(b). Nor does the plain text require any such thing. The definition of employer is satisfied by meeting any of the enumerated examples.

The same lesson of the text can be seen in a non-statutory example. If "drinking water" were defined as "any water from a water fountain, and any drinkable water from a well," either type of water would satisfy the definition. Drinking water would not be only the combined flow from the tap and the well. Similarly, in this case, each of the listed types of water constitutes waste water.

This plain-text reading is consistent with the state and federal governments' use of the term in a different context involving the District. A federal consent decree reinforces the District's authority to regulate uncontaminated storm water pursuant to R.C. Chapter 6119 by mandating that the District regulate storm water *before* it becomes contaminated. Consent Decree in *U.S. v. Ne. Ohio Reg'l Sewer Dist.,* N.D. Ohio No. 1:10CV2895-DCN (July 7, 2011).[1]

[1] Available at http://www.neorsd.org/I_Library.php?SOURCE=library/Signed-Consent-Decree-entered-7-7-11.pdf&a=download_file&LIBRARY_RECORD_ID=4994 (last visited May 9, 2014).

The United States District Court for the Northern District of Ohio entered a consent decree to resolve claims raised by the United States and Ohio for the District's alleged violations of the federal Clean Water Act and Ohio's Water Pollution Control laws. *Id.* at 1. The consent decree directs the District to develop a Green Infrastructure Plan for government approval, which specifies storm-water control measures and sets requirements to ensure the effectiveness of such measures. *Id.* at 21. The types of infrastructure that the District must establish pursuant to the consent decree include:

> the range of stormwater control measures that use plant/soil systems, permeable pavement, or stormwater harvest and reuse, to store, infiltrate, or evapotranspirate stormwater and reduce flows to the combined sewer system. Green infrastructure may include, but is not limited to, bioretention and extended detention wetland areas as well as green roofs and cisterns.

Id., Appx. 3, ¶ 8(p). The consent decree anticipates that the District will manage storm water before it reaches the combined sewer system. For example, the decree requires the District to collect at least 44 million gallons of storm water per year in order to prevent its release to the combined sewer overflows. *Id.,* Appx. 3, ¶ 2.

The lower court's judgment misconstrues "waste water" in R.C. 6119.011(K) contrary to the term's plain-text meaning. And it strips the District's power granted by the General Assembly to regulate uncontaminated storm water even though a federal court order, consistent with that plain language, requires the District to take such action. *See* App. Op. ¶¶ 44-45; Consent Decree, Appx. 3, ¶ 2. Accordingly, the Eighth District's holding that Chapter 6119 districts lack the authority to regulate storm water should be reversed.

B. Other powers granted to Chapter 6119 districts erase any doubt that they may manage storm water that is not combined with sewage or other contaminants.

Other definitions in Chapter 6119 confirm the plain-text meaning of "waste water." In support of their power to broadly manage waste water, Chapter 6119 districts have the authority to operate waste water facilities and water management facilities. *See* R.C. 6119.06(G) (districts may operate "water resource projects"); R.C. 6119.011(G) ("water resource projects" include "waste water facilities" and "water management facilities"). The districts' power to operate "waste water facilities" and "water management facilities" demonstrates that the General Assembly intended that the districts be able to manage storm water and contaminated water separately or combined. For example, the districts' power to operate water management facilities includes "facilities for stream flow improvement, dams, reservoirs, . . . stream monitoring systems, [and] facilities for stabilization of stream and river banks." R.C. 6119.011(M). Similarly, waste water facilities include "*storm* and sanitary sewers and other systems, whether on the surface or underground, designed to transport waste water." R.C. 6119.011(L) (emphasis added). Each of these facilities over which Chapter 6119 districts have power may involve waste water that is merely storm water, not storm water combined with sewage or other contaminants. By granting districts the power to operate such projects, it is evident that they may manage either storm water or contaminated water, and that the two need not be combined.

C. Interpreting both storm water and water containing pollutants to be waste water avoids absurd results.

"Waste water" as defined in R.C. 6119.011 must include uncontaminated storm water; otherwise, the application of R.C. 6119.01, the statute governing the District's "waste water" management, would lead to absurd results. The Court has long held that "when interpreting a statute, courts must avoid an illogical or absurd result." *AT&T Commc'n of Ohio, Inc. v. Lynch*, 132 Ohio St. 3d 92, 2012-Ohio-1975 ¶ 18 (internal quotation marks omitted).

Reading waste water as limited to the mixture of uncontaminated storm water and sewage is unworkable and would leave Chapter 6119 districts with no practical authority. If "waste water" is that narrow, it would consist only of contaminated storm water. As a result, the District would be limited to managing sewage and industrial waste water when mixed with storm water. *See* App. Op. ¶ 94 (Jones, J., dissenting). In other words, if Northeast Ohio suffered a drought without rain for weeks, the District would have no authority to manage the sewage and industrial waste water necessarily produced during that time. The General Assembly could not have contemplated such a result. *Id.* Thus, "waste water" in R.C. 6119.011 includes both uncontaminated storm water and contaminated water, even when the two are not mixed with each other.

The absurdity stretches in another direction as well. Other Chapter 6119 districts in Ohio engage mostly or entirely in storm-water management, and may not ever combine storm water with sewage or other contaminants. For example, the Deerfield Regional Storm Water District in Warren County was formed primarily to manage storm water alone, and most of what it does involves only storm water: "The District was created to address stormwater quality and quantity issues within Deerfield Township. The collection and disposal of stormwater (also known as wastewater) by the District includes projects which address flooding through the repair,

replacement or construction of infrastructure facilities." Who We Are, Deerfield Regional Storm Water District, http://www.deerfieldstormwater.com/ (last visited May 8, 2014). These storm-water management activities would not be possible under the Eighth District's narrow interpretation of the authority granted to Chapter 6119 districts. Indeed, districts like Deerfield could not *exist* if the Eighth District's reading of the statute were correct.

D. The authorities relied upon by the Eighth District do not require that waste water include both storm water and contaminated water.

In discarding the plain language of the definition of "waste water," the Eighth District relies on dicta from an irrelevant case, statements in unrelated sections of the District's plan, and the possibility that other kinds of joint political subdivisions may engage in activities similar to 6119 Districts. None of this supports its cavalier treatment of the statute's plain text.

The Eighth District draws on a First District case about a flooded basement that has no bearing on the power granted to Chapter 6119 districts. *See* App. Op. ¶ 44 (citing *Reith v. McGill Smith Punshon, Inc.*, 163 Ohio App. 3d 709, 2005-Ohio-4852 (1st Dist.)). In that case, the First District considered homeowners' claims that surface water runoff from a neighboring subdivision's drainage system flooded their house and that the system's faulty underground pipes created a sinkhole under their property. *Reith*, 2005-Ohio-4852 ¶¶ 5-6. The statute of limitations posed an obstacle, but the homeowners argued that the sinkhole presented an independent claim because underground sewage, not water that was trespassing on their surface, caused the sinkhole. *Id.* ¶¶ 32-33. Specifically, they asked the appeals court to hold that surface storm water constitutes sewage as soon as it is transported through an underground pipe. *Id.* ¶ 24. The First District concluded that the essential character of surface water and sewage is what it contains, not whether it is above or below ground. *Id.* ¶ 30. For this reason, the Court held that the storm water that caused the surface flooding was indistinguishable from the

underground storm water that caused the sinkhole. *Id.* ¶¶ 27-30, 33. In dicta, the First District cited R.C. 6119.011 in distinguishing surface and sewer water: "[s]ewage is defined as any substance containing excrement, while waste water means any storm water containing sewage or other pollutants." *Id.* ¶ 29 (citing R.C. 6119.011(I), (K)). The definition of "waste water," and particularly the power granted to Chapter 6119 districts, was not relevant to the case or to the ultimate analysis. The First District simply did not consider the issue that was presented here to the Eighth District.

The Eighth District also improperly relied on the definitions of "waste water" in unrelated titles of the District's plan. *See* App. Op. ¶ 44. ("Indeed, the District's own 'waste water' definition in Titles I, II, and IV of its code of regulations recognizes it as 'a combination of water-carried waste . . . together with such ground, surface or storm water as may be present'"). As an initial matter, a regional district may not abrogate Ohio laws by its own rules. R.C. 6119.08. Further, this case examines the District's authority under Title V of the District's Code of Regulations, not the other titles relied upon by the appeals court. As Judge Jones explained in dissent, "[t]he definitions in those Titles apply to those Titles." *Id.* ¶ 98 (Jones, J., dissenting). Additionally, the plan's definition is internally consistent. Wastewater *includes* the combination of storm water and sewage; it simply is not *limited* to that combination.

The Eighth District also asserted that, because other types of regional districts, including watershed districts and conservancy districts, have authority related to storm water, Chapter 6119 districts do not. App. Op. ¶ 46. The decision below specifically identifies those districts' powers to develop water resources and to "prevent floods," "regulat[e] stream channels," "irrigate[e]," "divert[] watercourses," and "arrest[] erosion." But just because some other type of district has authority to manage storm water does not mean that Chapter 6119 districts do not.

Overlapping authority is a pervasive feature of modern government. Federal and State laws criminalize the same acts. Cities and school districts tax the same property. And an entire Chapter of the Revised Code involves "municipal and county cooperation" with the State for transportation projects. Any overlap does not erase Chapter 6119 districts' plain statutory authority to engage in types of storm-water management such as the power to manage "facilities for stream flow improvement, dams, reservoirs, and . . . facilities for the stabilization of stream and river banks." R.C. 6119.011(M). That R.C. 6101.04 allows conservancy districts to engage in some similar activities does not deprive regional 6119 districts of their statutory authority to manage storm water.

CONCLUSION

For the foregoing reasons, the Court should reverse the Eighth District Court of Appeals' judgment that Chapter 6119 districts lack the statutory authority to manage storm water.

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