In the

Supreme Court of Ohio

CITY OF CINCINNATI,	:	Case No. 2013-1102
	:	
Plaintiff-Appellant,	:	On Appeal from the
	:	Hamilton County
v.	:	Court of Appeals,
	:	First District
DANIEL ILG,	:	
	:	Court of Appeals
Defendant-Appellee.	:	Case No. C 120667
	:	

MERIT BRIEF OF *AMICUS CURIAE* STATE OF OHIO IN SUPPORT OF APPELLANT CITY OF CINCINNATI

JOHN P. CURP (0064782)
City Solicitor
CHARLES A. RUBENSTEIN (0017870)
City Prosecutor
JENNIFER BISHOP* (0014934)
Assistant City Prosecutor
**Counsel of Record*
City of Cincinnati
801 Plum Street, Suite 226
Cincinnati, Ohio 45202
513-352-4708; 513-352-5217 fax
jennifer.bishop@cincinnati-oh.gov

Counsel for Plaintiff-Appellant
City of Cincinnati

STEVEN R. ADAMS (0052743)
MARGUERITE SLAGLE* (0082217)
**Counsel of Record*
The Law Office of Steven R. Adams
8 W. Ninth Street
Cincinnati, Ohio 45202
513-929-9333; 513-929-9337 fax

Counsel for Defendant-Appellee
Daniel Ilg

MICHAEL DEWINE (0009181)
Attorney General of Ohio
ERIC E. MURPHY* (0083284)
State Solicitor
**Counsel of Record*
JEFFREY JAROSCH (0091250)
Deputy Solicitor
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
eric.murphy@ohioattorneygeneral.gov

Counsel for *Amicus Curiae*
State of Ohio

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INTRODUCTION

This case concerns the State's ability to prosecute drunk-driving cases using the results of breath tests. This Court in *State v. Vega*, 12 Ohio St. 3d 185 (1984) (per curiam), and nearly all of the lower courts in the State since *Vega* have recognized a clear rule: When the General Assembly, through the Director of Health, establishes that a specific breath-testing instrument is a reliable method for conducting an alcohol breath test, criminal defendants may not challenge the general reliability of that instrument, and instead may challenge only the specific test undertaken in the specific case. *See id.* at 186-88. The State files this brief for two reasons—to reaffirm the propriety of this longstanding legal rule and to make clear its consequences for the scope of discovery in the thousands of OVI cases that the State must prosecute each year.

First, the Court should take this opportunity to reaffirm *Vega*'s legal rule. That conclusion follows as a matter of stare decisis alone. The rule has now existed for almost thirty years, and it has proven workable during that time. Numerous lower-court decisions show a clear understanding of its general legal framework. Aside from stare decisis concerns, the rule is also correct as a matter of first principles. *Vega* appropriately defers to the legislative and executive branches, which are better suited to undertake the scientific fact-finding necessary for determining the general reliability of breath-testing instruments. And *Vega* appropriately treats the reliability of a breath-testing instrument as a "legislative" fact requiring resolution as a uniform matter rather than as an "adjudicative" fact to be re-adjudicated anew by each jury in each OVI case. Finally, any rule other than *Vega*'s could cripple the State's ability to prosecute the (still unfortunately) high number of drunk-driving cases by requiring the State to repeatedly prove in thousands of cases a complicated (yet legislatively resolved) scientific fact that certain breath-testing instruments are reliable if properly used.

Second, the Court should take this opportunity to explain the consequences of *Vega*'s clear legal rule on the scope of discovery in OVI cases. It follows from *Vega*'s rule that potential evidence relevant only to the general reliability of a breath-testing instrument is not the subject of a proper subpoena request. Such evidence has no legal relevance given that the general reliability of the breath-testing instrument cannot be put at issue in the case. Indeed, to allow such broad-ranging discovery would only serve to undermine one of *Vega*'s rationales through the backdoor—by imposing the very burdens on the State in the thousands of OVI cases that the *Vega* rule rightly prevents, only this time at the discovery stage rather than the trial stage. Furthermore, because evidence going only to the general reliability of the breath-testing instrument is irrelevant, a failure to comply with an improper discovery request seeking that evidence cannot serve as the basis for suppression of the breath test.

STATEMENT OF *AMICUS* INTEREST

The State of Ohio has an interest in this case for several reasons. The Ohio Department of Health and its Director of Health bear responsibility for approving breath-testing instruments for use by Ohio law enforcement and for creating the regulations and procedures that guide the use of those approved instruments. *See* R.C. 3701.143; Ohio Adm. Code Chapter 3701-53. If, therefore, courts do not enforce *Vega*'s clear rule at the discovery stage, it could lead to overly burdensome discovery demands on state officials within the Department of Health. In addition, drunk driving remains a significant public-health problem throughout Ohio. The Ohio State Highway Patrol, for example, must make thousands of OVI arrests each year. *See, e.g.*, Ohio State Highway Patrol, 2012 Operational Report, at 11 (July 2013), *available at* http://statepatrol.ohio.gov/doc/2012_OperationalReport_Final_20130801.pdf. And, in 2012, 482 people in Ohio lost their lives as a result of drunk driving. *Id.* at 7. Thus, aside from protecting its agencies from burdensome discovery on irrelevant matters, the State also has a significant

interest in ensuring that its law-enforcement officers may reasonably investigate and prosecute drunk driving using the procedures intended by the General Assembly.

STATEMENT OF THE CASE AND FACTS

A. R.C. 4511.19(A)(1)(d) prohibits operating a motor vehicle with a prohibited breath-alcohol level as measured by a breath-testing instrument approved by the Director of Health.

Under R.C. 4511.19(A)(1)(d), "[n]o person shall operate any vehicle . . . if, at the time of the operation . . . [t]he person has a concentration of eight-hundredths of one gram or more but less than seventeen-hundredths of one gram by weight of alcohol per two hundred ten liters of the person's breath." The General Assembly has delegated to the Director of Health the duty to establish "techniques or methods for chemically analyzing a person's . . . breath" and to "ascertain the qualifications of individuals to conduct such analyses . . . ." R.C. 3701.143.

The Director of Health has approved several instruments for testing individual's breath-alcohol content, including the instrument used in this case. Ohio Adm. Code 3701-53-02(A). The Director has also promulgated detailed regulations for conducting breath tests with these instruments, Ohio Adm. Code 3701-53-02(C)-(E), for conducting "instrument checks, controls and certifications," Ohio Adm. Code 3701-53-04, and for establishing, permitting, and revoking qualifications for operators of breath-testing instruments, Ohio Adm. Code 3701-53-07, 3701-53-08, 3701-53-09, 3701-53-10.

B. 19-year-old Daniel Ilg was in a one-car accident, and registered a breath-alcohol content well above the legal limit, but the lower courts suppressed the breath test.

Cincinnati police encountered 19-year-old Daniel Ilg when he crashed his car. After observing signs of impairment, police officers tested Ilg's breath on an instrument approved by the Director of Health. Ilg's test registered .143 grams of alcohol per 210 liters of breath, a number approaching twice the legal limit of .08 grams. Among other offenses, Ilg was charged

with operating a motor vehicle while having a concentration of alcohol in the breath at or above .08 grams in violation of R.C. 4511.19(A)(1)(d).

During discovery, Ilg sought a long list of documents and data from non-party Mary Martin, an employee of the Department of Health. In the subpoena issued to Martin, he asserted that he only sought "records maintained by the Ohio Dept. of Health and the Ohio Dept. of Safety relating to the [specific] Intoxilyzer 8000 [used to test his breath]." Hearing Tr., Ex. 1. But even a cursory review of his requests shows that Ilg sought a much broader set of materials. The subpoena sought, for example, "[a]ny and all computerized online breath archives data," and "[a]ny and all correspondence, including but not limited to, letters, emails, memorandums, correspondence, notes, text messages, internal correspondence regarding the Intoxilyzer 8000 among and between Ohio Dept. of Health employees and/or agents, Ohio Dept. of Public Safety employees and/or agents, and CMI, Inc. employees and/or agents." *Id.* A request seeking all documents concerning the general type of machine at issue and all data results for the many tests that the machine has performed could only be relevant to the machine's general reliability; this far-ranging evidence has no relationship to the *specific test* in the specific case. This broad subpoena included one request with which Martin was unable to comply—the request for "[a]ny and all computerized online breath archives data, also known as 'COBRA' data." *Id.* While this broad request may have included data relative to the specific instrument in Ilg's case, the request seeks "any and all" archives data—arguably for the hundreds of instruments in use by law enforcement. Such a broad request would go to general reliability. According to Martin, she could not provide this data because the Department did "not have the ability to copy it or get it copied in any way to anybody else." Hearing Tr. at 115.

Ilg moved the trial court to suppress the result of the breath test as a sanction for Martin's inability to provide the computerized online breath archives data. *Id.* at 2. The trial court suppressed the results of the breath test because the Department of Health could not produce the data. *Id.* at 162-64. The First District affirmed, finding that the computerized online breath archive data "was needed for trial preparation, and that [appellee] had requested the material in good faith." *City of Cincinnati v. Ilg*, 2013-Ohio-2191 ¶ 9 (1st Dist.).

ARGUMENT

Appellant's Proposition of Law:

> *State v. Vega prohibits defendants in OVI cases from making attacks on the general reliability of breath testing instruments, thus a defendant cannot compel any party to produce information that is to be used for the purpose of attacking the general reliability of the breath testing instrument.*

In filing this *amicus* brief, the State of Ohio asks the Court to adopt the City of Cincinnati's Proposition of Law. The City's proposition contains two generally applicable legal rules that should govern the many OVI cases prosecuted in this State each year. *First*, the Court should reaffirm *State v. Vega*, 12 Ohio St. 3d 185 (1984) (per curiam). For thirty years, *Vega* has stated the law in Ohio—prohibiting criminal defendants from challenging the general reliability of breath-testing instruments approved by the Director of Health. *Second*, the Court should make clear that *Vega*'s bright-line rule has clear consequences for the scope of discovery in OVI cases. Discovery requests seeking evidence merely to attack the general reliability of an approved breath-testing instrument should not be permitted because that evidence is irrelevant to any available defense in those types of cases.

A. *Vega* correctly held that a criminal defendant may not challenge the general reliability of a properly approved breath-testing instrument.

In 1984, this Court recognized that Ohio's General Assembly had legislatively determined that certain breath-testing instruments are reliable for determining the alcohol content

in a driver's body. *See Vega*, 12 Ohio St. 3d at 186-87. *Vega* considered "whether an accused may use expert testimony to attack the general reliability of intoxilyzers as valid, reliable breath testing machines in view of the fact that the General Assembly has legislatively provided for the admission of such tests in R.C. 4511.19." *Id.* at 186. The Court held that a defendant may not do so, because the General Assembly had "legislatively resolved the questions of the reliability and relevancy of intoxilyzer tests." *Id.* at 188. The General Assembly had done so by delegating to the Director of Health the authority to determine "the mechanism which would be used for measuring blood alcohol content of an individual." *Id.* Thus, the Court held, the common-law evidentiary "'determination that breath tests, properly conducted, are reliable . . . [had] been replaced by statute and rule . . . .'" *Id.* at 188-89 (quoting *State v. Brockway*, 2 Ohio App. 3d 227, 232 (4th Dist. 1981)).

Based on its recognition that the General Assembly had determined the circumstances under which breath tests are reliable, this Court held that criminal defendants may not seek to undercut that legislative determination. If a court were to allow a criminal defendant to do so, it would "simply fail[] to afford the legislative determination that intoxilyzer tests are proper detective devices the respect it deserves." *Id.* at 188. While the Court prohibited attacks on the general reliability of devices approved by the Director of Health, it allowed criminal defendants to present evidence "attack[ing] the reliability of the specific testing procedure and the qualifications of the operator" in the particular case. *Id.* at 189.

For many reasons, the Court should reaffirm *Vega*'s holding in this case.

Stare Decisis. To begin with, *Vega* should be followed solely as a matter of stare decisis, "the bedrock of the American judicial system." *Westfield Ins. Co. v. Galatis*, 100 Ohio St. 3d 216, 2003-Ohio-5849 ¶ 1. Since this Court decided *Vega* in 1984, it has served as the basis for

thousands of drunk-driving prosecutions under R.C. 4511.19(A). The law is clear. An OVI defendant may not introduce evidence for a general attack on an approved breath-testing instrument, but may introduce evidence for a specific attack on the particular instrument on which he was tested or on the particular circumstances surrounding that test. *Vega*, 12 Ohio St. 3d at 187-88. This workable distinction between a general challenge and a specific one has been recognized and reaffirmed by this Court many times. "*Vega* holds that the reliability of intoxilyzers, having been legislatively determined, may not be generally attacked by an accused," *In re Election of November 6, 1990 for the Office of Attorney General of Ohio*, 58 Ohio St. 3d 103, 113 (1991), but "[i]t is well-established that a defendant may challenge the accuracy of *his specific* test results," *City of Columbus v. Taylor*, 39 Ohio St. 3d 162, 163 (1988). *See also, e.g., State v. Tanner*, 15 Ohio St. 3d 1, 6 (1984) ("The defendant may still challenge the accuracy of his specific test results, although he may not challenge the general accuracy of the legislatively determined test procedure as a valid scientific means of determining blood alcohol levels."); *Taylor*, 39 Ohio St. 3d at 165 (Douglas, J., concurring) ("The only evidence relevant to attacking the validity of the test results is evidence which would show that the test was not properly conducted, the health department regulations were not followed, the machine was not properly calibrated or the operator was not qualified to administer the test.").

The lower courts, too, have had no trouble applying *Vega*'s legal framework countless times in countless OVI cases. *See, e.g., State v. Fisher*, 2009-Ohio-2258 ¶¶ 27-28 (1st Dist.) ("[A]n accused may not make a general attack upon the reliability and validity of a breath-testing instrument. Nevertheless, the accused may attack the reliability of the specific testing procedure and the qualifications of the operator and may present expert testimony on these issues."); *State v. Harding*, 2006-Ohio-481 ¶ 32 (2d Dist.) (same); *State v. Mongeau*, 2012-Ohio-5230 ¶ 15 (3d

Dist.) (same); *State v. Reid*, 2013-Ohio-562 ¶¶ 11-12 (4th Dist.) (same); *State v. Butler*, 2013-Ohio-4451 ¶ 15 (5th Dist.) (same); *State v. Faykosh*, 2002-Ohio-6241, ¶ 34 (6th Dist.) (same); *City of Richmond Heights v. Williams*, No. 73500, 1998 WL 827594 at *5 (8th Dist. Nov. 25, 1998) (same); *State v. Morlock*, 67 Ohio App. 3d 654, 658-59 (9th Dist. 1990) (same); *State v. Miskel*, No. 99AP-482, 2000 WL 311920, at *2 (10th Dist., Mar. 28, 2000) (same); *State v. Schrock*, 2013-Ohio-441, ¶ 19 (11th Dist.) (same); *State v. Dugan*, 2013-Ohio-447, ¶ 20 (12th Dist.) (same); *see also Miskel v. Karnes*, 397 F.3d 446, 453 (6th Cir. 2005) ("The Ohio legislature has committed the determination of whether certain breath testing machines are generally reliable to the state's Director of Health.").

In short, *Vega*'s guiding principle is clear: the General Assembly, through the Director of Health, may determine that a breath-testing instrument is generally reliable. If it does so, that conclusion is not subject to an attack in individual OVI cases. This rule should be reaffirmed in this case.

Judicial Deference. Wholly apart from concerns for stare decisis, *Vega* correctly held that criminal defendants in OVI cases may not challenge the general reliability of approved breath-testing instruments. In particular, this holding gives the appropriate deference to decisions made by the co-equal branches of government. *Vega* recognizes that the General Assembly sought to legislatively answer—across the board in all cases—"most . . . questions as to the general reliability of the tests and the relation between blood-alcohol levels and driver impairment." 12 Ohio St. 3d at 188 (quoting McCormick, Evidence 511 (2 ed. 1972)). And this Court "afford[ed] th[is] legislative determination that [breath] tests are proper detective devices the respect it deserves." *Id.* By doing so, the Court recognized its place in this administrative scheme. "The Director of Health, not the court, was delegated with the discretionary authority

for adoption of breath testing devices and the procedures for their use." *State v. Yoder*, 66 Ohio St. 3d 515, 518 (1993).

It made sense for the *Vega* Court to defer to the General Assembly's judgment about the general reliability of approved breath-testing instruments. For one thing, "when a legislature 'undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation.'" *Kansas v. Hendricks*, 521 U.S. 346, 360 n.3 (1997) (quoting *Jones v. United States*, 463 U.S. 354, 370 (1983)). So, for example, the legislature may constitutionally require individuals to get small-pox vaccinations even if disagreement exists over whether such vaccinations are medically beneficial, because "there is scarcely any belief that is accepted by everyone." *Jacobson v. Massachusetts*, 197 U.S. 11, 35 (1905); *see also Kraus v. City of Cleveland*, 163 Ohio St. 559, 561 (1955). Here, too, the General Assembly could constitutionally make the reasonable determination that certain "'breath tests, properly conducted, are reliable irrespective that not all experts wholly agree'" on that scientific subject. *Vega*, 12 Ohio St. 3d at 188 (citation omitted); *cf. Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 74 (2009) ("Federal courts should not presume that state criminal procedures will be inadequate to deal with technological change.").

For another, the general reliability of a breath-testing instrument—in contrast to the specific reliability of a particular test—cuts across many OVI cases and thus much more resembles a "legislative" fact than an "adjudicative" one. "Legislative facts are ordinarily general and do not concern the immediate parties." *United States v. Gould*, 536 F.2d 216, 220 (8th Cir. 1976) (quoting 2 K. Davis, Administrative Law Treatise § 15.03, at 353 (1958)); *see also, e.g., United States v. Hernandez-Fundora*, 58 F.3d 802, 812 (2d Cir. 1995). These types of

facts should not be resolved on a case-by-case, idiosyncratic basis, but on a statewide, uniform basis. *See A Woman's Choice-East Side Women's Clinic v. Newman*, 305 F.3d 684, 688 (7th Cir. 2002) (Easterbrook, J.). Indeed, to submit the question of an instrument's general reliability to the jury in each case would "be preposterous, thus permitting juries to make conflicting findings" on the same issue over and over again. *Gould*, 536 F.2d at 221. Such a regime would result in unfair inconsistencies across OVI cases—convictions in some, acquittals in others based merely on each jury's differing views of the same evidence concerning an instrument's general reliability. *See Lockhart v. McCree*, 476 U.S. 162, 168 n.3 (1986) (noting the problems with differential treatment across cases for legislative facts); *A Woman's Choice*, 305 F.2d at 688 (recognizing that it would be "unsound to say that, on records very similar in nature," appellate courts could allow "different district judges [to] reach[] different conclusions about the inferences to be drawn from the same body of statistical work").

Taken together, these principles illustrate that *Vega* got it right. Questions concerning the general reliability of a particular instrument should be answered on a uniform basis—whether by the courts through common-law decisionmaking or by the General Assembly through legislation. And the General Assembly's decision to adopt legislation directing an expert agency (rather than the courts) to answer this question should receive substantial deference.

Administrative Realities. Finally, *Vega* properly balances the competing concerns in this area. On the one hand, *Vega* recognizes the unfortunately high number of drunk-driving cases. Drunk driving is a serious social problem that the General Assembly has chosen to combat by strong punishments and clear procedures across the many cases in which it arises. *See Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 451 (1990) ("No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it."). There were,

for example, more than 24,000 OVI arrests in Ohio in 2012. *See* Ohio State Highway Patrol, 2012 Operational Report, at 11 (July 2013), *available at* http://statepatrol.ohio.gov/doc/2012_OperationalReport_Final_20130801.pdf. A case-by-case rule to determining the general reliability of a properly approved breath-testing instrument would impose unmanageable burdens on the State. The State would have to reinvent the wheel in each case—introducing expert testimony to prove that the breath-testing instrument reliably records alcohol content as a general matter. Travelling experts would have to constantly jump across the State to testify in these numerous, geographically dispersed cases. Such a requirement could allow some drunk drivers to escape prosecution simply due to the enormous burdens imposed on the State for obtaining a conviction in any particular case.

On the other hand, *Vega* respects the rights of criminal defendants. Its rule does not eliminate their right to put on a defense. Rather, it merely recognizes that the defense should be specific to the facts of the case and of the particular test. As the Sixth Circuit noted when rejecting federal habeas relief based on a constitutional challenge to *Vega*'s approach, a criminal defendant may still dispute "whether the specific machine used to test [the defendant] functioned properly and reliably during the particular test in question and whether the officers who operated the machine did so in accordance with the Health Department's regulations." *Miskel*, 397 F.3d at 453. Because a defendant retains these rights, he "'cannot be heard to complain that the provisions of R.C. 4511.19 eliminate his presumption of innocence or hamper the presentation of his defense.'" *Vega*, 12 Ohio St. 3d at 189 (citation omitted); *see also United States v. Scheffer*, 523 U.S. 303, 308 (1998) (noting, when upholding a *per se* ban on the admission of polygraph evidence, that "state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials.").

B. Discovery requests seeking evidence to attack the general reliability of an approved breath-testing instrument are improper.

Since *Vega*, a criminal defendant to an OVI charge may not challenge the general reliability of a breath-testing instrument that has been approved by the Director of Health. This case provides the Court an opportunity to articulate the consequences of *Vega*'s legal rule. It directly follows from *Vega* that a criminal defendant may not issue a subpoena for documents or other information that merely seeks to undertake the general attack on an approved breath-testing instrument that *Vega* prohibits.

Crim. R. 17 governs the scope of subpoenas in criminal cases. Under the rule, a court may quash a subpoena "if compliance would be unreasonable or oppressive." Crim. R. 17(B). This Court has interpreted the rule to require the proponent of the subpoena to prove:

> "(1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general fishing expedition."

In re Subpoena Duces Tecum Served Upon Atty. Potts, 2003-Ohio-5234, syl. (quoting *United States v. Nixon*, 418 U.S. 683, 699-700 (1974)). Under this rule or its federal counterpart, courts have often quashed subpoenas that seek irrelevant evidence. *See, e.g., State v. Widmer*, 2012-Ohio-4342, ¶¶ 128-29 (12th Dist.); *State v. Soke*, No. 90-L-14-061, 1992 WL 190170, at *9-10 (11th Dist. Mar. 6, 1992); *City of Cleveland v. Sabo*, No. 41999, 1981 WL 4949, at *6 (8th Dist. May 14, 1981); *see also United States v. Komisaruk*, 885 F.2d 490, 494-95 (9th Cir. 1989).

The Court should hold that this rule applies in the *Vega* context. Any subpoena issued by an OVI defendant to obtain documents or evidence tending to prove or disprove the general reliability of breath-testing instruments will necessarily fail the four-part test for subpoena enforcement. These subpoenas fail the first part of the enforcement test because general-

reliability evidence does not affect any issue in OVI cases and is thus not "evidentiary and relevant." *In re Subpoena*, 2003-Ohio-5234, syl. They also fail the third part of the enforcement test because, since general-reliability evidence is inadmissible in OVI cases, every OVI defendant can "properly prepare for trial without" it. *Id.* In many cases, a subpoena seeking general-reliability evidence will even fail the fourth part of the enforcement test because a request for evidence an attorney knows to be irrelevant and inadmissible can rarely be undertaken "in good faith and . . . not . . . as a general fishing expedition." *Id.* Accordingly, subpoenas seeking documents or other evidence about the general reliability of breath-testing instruments in OVI cases are never enforceable.

Writing a different rule would necessarily diminish the standard for subpoena enforcement, allowing defendants to seek irrelevant evidence and then compel others to provide it. That result would only add expense and delay to the thousands of OVI cases brought throughout Ohio and would impose the very burdens on the State that the *Vega* rule rightly prevents, only now at the discovery stage rather than the trial stage. And ultimately, the added expense and delay would not even benefit OVI defendants, since *Vega* excludes evidence about the general reliability of breath-testing instruments once a case reaches trial in any event. Nor would the added expense and delay be confined only to the prosecution—a diminished standard for subpoena enforcement is just as likely to affect defendants and third parties by permitting any party to compel another to produce documents that are irrelevant to the case.

These intolerable consequences are avoidable here. The Court should apply *Vega* and hold that an OVI defendant may not subpoena documents or other information that merely seek to undertake a general attack on an approved breath-testing instrument.

CONCLUSION

For the foregoing reasons, this Court should reaffirm *Vega*'s clear rule and hold that it prohibits discovery that merely seeks to uncover evidence to challenge the general reliability of a breath-testing instrument approved by the Director of Health.

Respectfully submitted,

MICHAEL DEWINE (0009181)
Attorney General of Ohio

ERIC E. MURPHY* (0083284)
State Solicitor
**Counsel of Record*
JEFFREY JAROSCH (0091250)
Deputy Solicitor
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
eric.murphy@ohioattorneygeneral.gov

Counsel for *Amicus Curiae*
State of Ohio

CERTIFICATE OF SERVICE

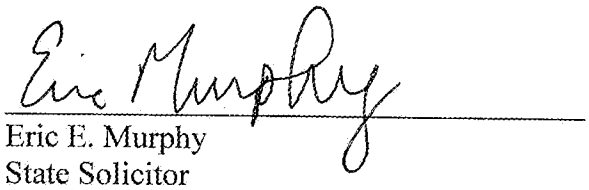
I certify that a copy of the foregoing Merit Brief of *Amicus Curiae* State of Ohio in Support of Appellant City of Cincinnati was served by U.S. mail this 27th day of January, 2014 upon the following counsel:

John P. Curp
City Solicitor
Charles A. Rubenstein
City Prosecutor
Jennifer Bishop
Assistant City Prosecutor
City of Cincinnati
801 Plum Street, Suite 226
Cincinnati, Ohio 45202

Counsel for Plaintiff-Appellant
City of Cincinnati

Steven R. Adams
Marguerite Slagle
The Law Office of Steven R. Adams
8 W. Ninth Street
Cincinnati, Ohio 45202

Counsel for Defendant-Appellee
Daniel Ilg



Eric E. Murphy
State Solicitor