IN THE SUPREME COURT OF OHIO

CRAIG D. CORDER, et al., Plaintiffs/Appellees, vs. OHIO EDISON COMPANY, Defendant/Appellant.	)	On Appeal from the Harrison County Court of Appeals, Seventh Appellate District Case No. 2023-0216 Court of Appeals Case No. HA20210008

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I. INTRODUCTION

Does "an easement granting a public utility 'the right to trim, cut and remove * * * trees, limbs, underbrush or other obstructions' permit[] the public utility to use herbicide to control vegetation within the easement?" *Corder v. Ohio Edison Co.*, 162 Ohio St.3d 639, 2020-Ohio-5220, 166 N.E.3d 1180, ¶ 1 (hereinafter *Corder II*). Both the Harrison County Court of Common Pleas and the Seventh District Court of Appeals have said no.

Though this is a textual question, Ohio Edison dedicates much of its brief to discussing, through the testimony of various employees and experts, the blackout of 2003, the history of the federal National Electrical Safety Code ("NESC"), Ohio's Public Utilities Commission ("PUCO") and its regulations, the elements of Ohio Edison's Transmission Vegetation Management Program ("TVM Program"), the characteristics of the vegetation on the Corders' property, and the properties of the herbicides Ohio Edison plans to spray. But "administrative expertise is not needed to determine whether the language in the easements granting Ohio Edison 'the right to trim, cut and remove at any and all times such trees, limbs, underbrush or other obstructions' also authorizes it to use herbicides to control vegetation within the easements. Nor does that determination turn on a consideration of the requirements of Ohio Edison's TVM program, an expert opinion on the need to use herbicides, industry practice, or the PUCO's regulations." *Id*. at ¶ 24. "Rather, the scope of an easement must be determined from the plain language of the conveyance that created it." *Id*. at ¶ 25. And that language does not change when there is a blackout, or upon the imposition of a new regulatory scheme.

Read plainly, the Easements' operative phrase – "trim, cut and remove" – does not vest Ohio Edison with an unlimited right to do whatever it wants to vegetation on the Corders' property. Instead, it authorizes Ohio Edison to deal with obstructions by using certain, expressly identified

methods. More modern easements may grant additional rights, in part because of the regulatory framework Ohio Edison emphasizes. See, e.g., *Beaumont v. Firstenergy Corp.*, 11th Dist. Geauga No. 2004-G-2573, 2004-Ohio-5295, emphasis added (easement granting the rights to "trim, cut, remove *or otherwise control*"); *Nelson v. Frontier Power Co.*, 5th Dist. Coshocton Case No. 89-CA-17, 1990 Ohio App. LEXIS 2045 (May 21, 1990), emphasis added (easement granting the rights to "cut, *spray*, and trim"). But present-day concerns – even serious ones – cannot transfer to Ohio Edison more of the Corders' property than it bargained for in 1948. "The property rights of an individual are fundamental rights, and 'the bundle of venerable rights associated with property is strongly protected in the Ohio Constitution and must be trod upon lightly, *no matter how great the weight of other forces*.'" *Ohio Power Co. v. Burns*, 2022-Ohio-4713, at ¶ 22, quoting *City of Norwood v. Horney*, 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, at ¶ 38, emphasis added.

II. STATEMENT OF FACTS

A. FACTUAL HISTORY

The Easements were executed in 1948. (R. 1, Compl., Ex. A, B, and C.) It is undisputed that, for nearly seventy years, Ohio Edison dealt with vegetation on the Corders' property exclusively by trimming and cutting it, without issue. (*Id.*, Ex. D and E.) In 2017, however, Ohio Edison decided that it wished to spray chemical herbicides instead. (*Id.*) The Corders objected. While their organic farming practices and health concerns relating to Mrs. Corder's COPD were motivating factors, the Corders' legal objection is purely textual. The Easements do not give Ohio Edison any right to spray chemical herbicides; instead, they limit Ohio Edison's methods of dealing with obstructions to trimming them, cutting them, and carrying them away:

> The easement and rights herein granted shall include the right to erect, inspect, operate, replace, repair, patrol and permanently maintain upon, over and along the above described right-of-way across said premises all necessary structures, wires and other usual fixtures and appurtenances used for or in connection with the transmission and distribution of electric current, and the right of ingress and egress upon, over and across said premises for access to and from said right-of-way, and **the right to trim, cut and remove at any and all times such trees, limbs, underbrush or other obstructions as in the judgment of Grantee may interfere with or endanger said structures, wires or appurtenances, or their operation.**

(*Id*., Ex. A, B, and C, emphasis added.)

B. PROCEDURAL HISTORY

The trial court initially dismissed the case for lack of jurisdiction. (R. 33, J. Entry, May 17, 2018.) The Seventh District reversed that decision, found the Easements ambiguous, and remanded the case to the trial court for further proceedings consistent with its finding of ambiguity. *Corder v. Ohio Edison Co.,* 7th Dist. Harrison No. 18 HA 0002, 2019-Ohio-2639 (hereinafter *Corder I*). This Court affirmed the Seventh District's determination that Ohio's courts – and not the PUCO – must answer the question presented here. *Corder II* at ¶ 31. But it vacated as premature the portion of *Corder I* that reached the merits of the case.[1] *Id*. Accordingly, the trial court was tasked with deciding, in the first instance, "whether an easement granting a public utility 'the right to trim, cut and remove * * * trees, limbs, underbrush or other obstructions' permits the public utility to use herbicide to control vegetation within the easement?" *Id.* at ¶ 1, 31.

On remand, Ohio Edison argued that the word *remove* in the Easements grants it an unlimited right to deal with obstructions by any method whatsoever, including spraying chemical

[1] Ohio Edison misrepresents both *Corder I* and *Corder II* when it claims that the Seventh District "enter[ed] judgment in favor of [the Corders]", and that this Court subsequently "reversed the grant of summary judgment to [the Corders]". (Appellant's Merit Brief at p. 9.) The Seventh District did not enter judgment for either party, and this Court only reversed the portion of *Corder I* finding the Easements ambiguous. *See Corder I* at ¶ 53; *Corder II* at ¶ 31.

herbicides. (R. 54, Def's Supp. Br. at p. 3.) The trial court disagreed. It observed that Ohio Edison's overbroad interpretation renders the terms *trim* and *cut* surplusage, while simultaneously creating absurd outcomes – like Ohio Edison burning all of the vegetation near the easement or cutting down seventy-foot trees and leaving them for the Corders to clean up – incompatible with the Easements' text. (R. 65, J. Entry, July 28, 2021 at p. 4.) Instead, it held that, read plainly, the unambiguous phrase "trim, cut and remove" gives Ohio Edison only the rights to trim, cut, and carry away vegetation. (*Id*. at p. 3-4.)

On appeal, Ohio Edison admitted that – as the trial court observed – the unlimited right it seeks would allow it not just to remove vegetation, but also to control or redirect its growth, or to kill it where it stands without taking it anywhere, and that any of these could be achieved by whatever method Ohio Edison chooses (including, in its own words, "eradicating them with fire"). (R. 8, Appellant's Brief at p. 16.) Ohio Edison also insisted that the Easements do, in fact, permit it to leave felled trees, severed limbs, or the remains of burned vegetation on the Corders' property with no attendant obligation to clean them up. (R. 14, Appellant's Reply Brief at p. 4.)

The Seventh District rejected Ohio Edison's extreme interpretation and readopted its analysis from *Corder I,* noting that this Court vacated its finding of ambiguity only for being premature, not for being wrong. *Corder v. Ohio Edison Co.*, 2022-Ohio-4818, 205 N.E.3d 616 (7th Dist.), at ¶ 18 (hereinafter "Ruling"). Ultimately, though it found the Easements ambiguous where the trial court had not, the Seventh District agreed with the trial court's conclusion that *remove* cannot be read to give Ohio Edison an unlimited right to deal with obstructions by any method. *Id*. at ¶ 4, 30. So doing would "render the words 'trim' and 'cut' superfluous". *Id*. at ¶ 19. Additionally, "the regulatory structure cited by [Ohio Edison] did not come into being until 1999, more than a half of a century after the easements were drafted." *Id*. at ¶ 25. And "[t]here are many other words

or phrases that could have been used to express more expansive rights. The easement language here is clearly not as broad as the language in the *Beaumont* case discussed earlier, which contained the additional phrase 'or otherwise control at any and all times.'" *Id*. at ¶ 27.

Ohio Edison appealed the Seventh District's decision on two propositions of law, and this Court accepted review of the second.

III. ARGUMENTS IN OPPOSITION TO PROPOSITIONS OF LAW

Proposition of Law No. 2: ***When an Ohio court uses a last-resort canon of interpretation to construe an isolated word or phrase of a written utility easement against the grantee, it frustrates the easement's purpose and the important public policy obligating utilities to deliver necessary and adequate power under R.C. 4905.22.***

When an easement is created by express grant, "the extent of and limitations on the use of the land depend on the language in the grant." *State ex rel. Wasserman v. City of Fremont*, 140 Ohio St.3d 471, 2014-Ohio-4845, 2014-Ohio-2962, 18 N.E.3d 1252, 20 N.E.3d 664, 669. Here, the lower courts have explored the possible interpretations of the language at issue, and none of them gives Ohio Edison a right to spray chemical herbicides on the Corders' property.

A. *REMOVE* COULD BE ANTECEDENT TO *TRIM* AND *CUT*.

As an initial matter, it is not clear that the Easements give Ohio Edison an independent right to *remove* at all. Rather than a list of three distinct rights, "trim, cut and remove" could be two independent rights (*trim* and *cut*) with an attendant requirement to remove what has been trimmed or cut. For purposes of answering the single question presented here, it is undisputed that spraying herbicides is neither trimming nor cutting, nor is it "trimming and removing", nor is it "cutting and removing". If the Easements only give Ohio Edison two rights, therefore, neither of those rights could authorize Ohio Edison to spray herbicides. There are several reasons to read the Easements this way.

1. *Trim* and *cut* are alternatives.

First, *trim* and *cut* are alternatives, being varied forms of a similar act: *cut* covers activities that kill vegetation by cutting it off entirely (like cutting down a tree), while *trim* covers activities that leave the vegetation alive, but smaller and more manageable (like trimming a tree's branches). When Ohio Edison identifies obstructive vegetation, therefore, it can elect either to trim the offending plant back or to cut it down completely. See, e.g., *Beaumont*, *supra* (landowners challenged a utility's decision to cut down rather than trim trees); *Shinaberry v. Toledo Edison Co.*, 6th Dist. Lucas No. L-97-1389, 1998 Ohio App. LEXIS 3245 (same); *Corrigan v. Illum. Co.*, 175 Ohio App.3d 360, 2008-Ohio-684, 887 N.E.2d 363 (8th Dist.), reversed by *Corrigan v. Illum. Co.*, 122 Ohio St.3d 265, 2009-Ohio-2524, 910 N.E.2d 1009 (same). It is entirely reasonable, therefore, to read "trim, cut and remove" as a choice between two alternatives, with *remove* being antecedent to whichever selection Ohio Edison makes.[2] *See Corder I* at ¶ 41 ("'remove'" can be interpreted to mean 'to haul away after cutting or trimming'").

2. Ohio Edison must remove the trees it cuts down.

Additionally, if – as Ohio Edison insists – the Easements grant an independent right to remove vegetation without first cutting or trimming it, then they must also permit Ohio Edison to trim or cut vegetation without then removing it. Under such an interpretation, Ohio Edison could choose to cut down a stand of seventy-foot oak trees and leave them where they fall. (*See* R. 65, J.

[2] Below, Ohio Edison analogized "trim, cut and remove" to a dessert menu listing "nuts, sprinkles and maraschino cherry". (R. 8, Appellant's Brief at p. 25-26.) It claimed that allowing a customer to choose either *sprinkles and cherry* or *nuts and cherry*, but neither *cherry* alone, nor all three would be silly. (*Id*.) But the comparison is inapt because it ignores the alternative nature of *trim* and *cut*. It would make little sense to choose both, no matter how the words *trim*, *cut*, and *remove* were arranged. Why trim a tree *and* cut it down? *Nuts* and *sprinkles*, on the other hand, are not alternatives, so the analogy falls apart; of course someone could order a sundae with both toppings.

Entry, July 28, 2021 at p. 4.) Instead, the Easements should be read plainly as giving Ohio Edison discretion to cut down trees that it believes threaten its lines, but also requiring Ohio Edison to carry away the trees it cuts down, rather than leaving them for the Corders to clean up. To hold otherwise could expose the Corders (and all similarly-situated landowners) to utility company abuse.

3. *And* should be read jointly, not severally.

Finally, if the Easements' drafters had intended *remove* to be the third item in a list with *trim* and *cut*, they could have accomplished this by using the connecter *or* rather than *and*. *Corder I* at ¶ 41 ("The drafter could have also used the disjunctive connecter – 'or' – to show that 'remove' was an alternative to cutting and trimming, rather than simply an act to follow the acts of cutting and trimming."). In fact, there is an example of precisely this just a few words away:

> The easement and rights herein granted shall include * * * the right to **trim, cut <u>and</u> remove** at any and all times such **trees, limbs, underbrush <u>or</u> other obstructions** as in the judgment of Grantee may interfere with or endanger said structures, wires or appurtenances, or their operation.

(R. 1, Compl., Ex. A, B, and C, emphasis added.)

While *and* can sometimes be "chameleonlike", it is most ordinarily used jointly rather than severally:

> Specifically, [*and*] can be used either "jointly" (e.g., "[both] A and B") or "severally" (e.g., "A and B [meaning A or B, or both]"). For example, when a person speaks broadly of "charitable and educational institutions," does she use *and* jointly…to refer to individual institutions that are both charitable and educational--or severally…to refer to all institutions that are either charitable or educational, but may also be both? That people sometimes use *and* to connect mutually exclusive concepts, as in the phrase, "medical and burial expenses,"…only increases the potential for confusion.
>
> Yet the potential for confusion does not mean that every occurrence of the word *and* is ambiguous. On the contrary, the context in which the word appears often resolves any superficial uncertainty. In the phrase, "medical and burial expenses," for example, *and* is necessarily used severally: because no single expense can be both "medical" and "burial," interpreting *and* jointly would make no sense.

> The general rule in this circuit--and in Florida--is that "unless the context dictates otherwise, the word 'and' is presumed to be used in its ordinary sense, that is, [jointly]."

Shaw v. Natl. Union Fire Ins. Co., 605 F.3d 1250, 1254 (11th Cir.2010), internal citations omitted.

Here, the context matters. The Easements' drafters used both *and* and *or* while describing the right at issue ("the right to trim, cut and remove at any and all times such trees, limbs, underbrush or other obstructions"). We should not, therefore, interpret the words to mean the same thing (as Ohio Edison advocates). Courts presume that words are used for a specific purpose and avoid interpretations that render portions meaningless or unnecessary. *Wohl v. Swinney*, 118 Ohio St.3d 277, 2008-Ohio-2334, 888 N.E.2d 1062, ¶ 22 (2008). It makes far more sense here to simply follow the general rule and give each words its ordinary meaning – *and* indicating "jointly" and *or* indicating "severally". By doing so, *remove* is joined to *trim* and *cut*, not alternative to them.

B. IF *REMOVE* IS AN INDEPENDENT RIGHT, IT MUST BE READ NARROWLY TO AVOID CREATING SURPLUSAGE.

Rather than an antecedent act, Ohio Edison argues that *remove* is an independent, third method of dealing with obstructions. It claims that a third method is needed because the Easements refer to "other obstructions" than vegetation, some of which cannot be trimmed or cut. But it does not follow that this third method must be unlimited in scope. In fact, context makes clear that it cannot be.

1. *Remove* is not a catch-all.

The Attorney General claims that "[t]he only way to give full effect to the easements' text is by reading them to give Ohio Edison a catch-all right to remove obstructions". (Brief of the Ohio A.G., as Amicus Curiae, at p. 11.) But this is not so; the text makes clear that *remove* is not a catch-all term.

"[T]rees, limbs, underbrush or other obstructions" is a list of the things Ohio Edison may "trim, cut and remove". It is arranged as three examples ("trees, limbs, underbrush") followed by a catch-all ("other obstructions") separated by the disjunctive connector ("or"). The word *other* is critical because it makes clear that trees, limbs, and underbrush are specific examples of obstructions. Had the drafters omitted *other*, the list would become confusing, with the first three items on it being surplusage rather than examples.

"[T]rim, cut and remove", on the other hand, cannot be read as a list of examples followed by a catch-all. Had the drafters wanted to create another such list, they would have used the same, clear construction: "trim, cut *or otherwise* remove". *See, e.g.*, *Beaumont, supra* at ¶ 20. But they chose not to. Again, we must presume that words are used for a specific purpose and should avoid interpretations that render portions meaningless or unnecessary. *Wohl* at ¶ 22. Because the drafters wrote these two phrases differently, we must conclude that they intended them to be different – one is a list of specific examples followed by a catch-all, while the other is not.

The Attorney General also invokes the doctrine of *noscitur a sociis*, that "words that are listed together should be understood in the same general sense." (Brief of the Ohio A.G., as Amicus Curiae, at p. 11.) He claims that, since *trim* and *cut* are "specific ways of eliminating obstructions", *remove* should "bear a similar but separate meaning." *Id*. But his conclusion – that *remove* "functions as a catch-all that encompasses forms of elimination not specifically enumerated" – does not follow. *Id*. For *remove* to "bear a similar but separate meaning", it – like *trim* and *cut* – must be a specific, distinct method of eliminating obstructions. It cannot be a catch-all that includes all methods of eliminating obstructions, including *trim* and *cut*. Fortunately, *remove* can be read precisely this way.

2. Because *remove* is not a catch-all, its meaning must be narrow enough not to turn *trim* and *cut* into surplusage.

Since *remove* must be an alternative to *trim* and *cut*, it cannot be read so broadly that it swallows one or both of those terms, creating surplusage. "When interpreting a contract, [courts] will presume that words are used for a specific purpose and will avoid interpretations that render portions meaningless or unnecessary." *Wohl* at ¶ 22. But, as the Seventh District pointed out, "assuming that the right to 'remove' was a third and separate right, which included any reasonable method to prevent interference with or endangerment of the Line as determined by the PUCO, the terms 'cut' and 'trim' would be superfluous." *Corder I* at ¶ 42.

The 1948 printing of Webster's New International Dictionary, Second Edition, includes the following definitions of the transitive verb *remove* (page 2108, emphasis in original):

1. To change or shift the location, position, station, or residence of; to transfer, esp. in order to re-establish; …

2. To move by lifting, pushing aside, taking away or off, or the like; to put aside, apart, or elsewhere; …

3. To force (one) to leave a place or to go away; specif.: To dismiss from office, as to *remove* a postmaster. …

4. To get rid of, as though by moving; to eradicate; to eliminate; …

Ohio Edison argues that the fourth definition applies here, and that the Easements therefore give it the right to get rid of, eradicate, or eliminate "trees, limbs, underbrush or other obstructions" using any method, without limitation.[3] But, if this were so, what purpose would *trim* and *cut* serve?

[3] It is not clear that herbicide use would fit even within these expansive additional meanings. The idiom "get rid of" means "[t]o be or become free, quit, or delivered from; as, he had at last *got rid* of his companions; you are well rid of your bargain; to *get rid* of a cold." *Id*. at 2144, emphasis in original. "Eradicate" means "[t]o pluck up by the roots; to root up or out; hence, to extirpate; as, to *eradicate* disease." *Id*. at 866, emphasis in original. And "eliminate" means "[t]o put out of doors; to thrust out; … [t]o remove and get rid of by disengaging from environment or associations;

Why should we presume the Easements' drafters had the fourth of these meanings in mind when they chose the word *remove*? Not every dictionary entry applies in every context. Imagine, for example, a judge becoming exasperated with counsel at oral argument: "That's enough! Bailiff, remove attorney Smith!" The bailiff would (one hopes) understand that he had not been instructed, as though by a movie villain, to "eliminate" or "eradicate" the offending barrister. Certainly, it would be unreasonable to spray poor attorney Smith with chemicals until he died. The bailiff would, instead, physically move attorney Smith from his location in the courtroom to one elsewhere, as the context makes clear.

Ohio Edison and the amici implicitly acknowledge this point by referencing the first, second, and fourth definitions of *remove* listed above while ignoring the third. (*See* Appellant's Merit Brief at p. 18-19; Brief of the Ohio A.G., as Amicus Curiae, at p. 9 (listing the first, second, and fourth definitions only).) They do this because context makes it obvious that the Easements' drafters did not use *remove* in the sense of forcing a person to go away or dismissing someone from office. Likewise, the context tells us that the drafters did not use *remove* to mean complete, unfettered elimination or eradication, because that meaning would render *trim* and *cut* surplusage.

To put it another way: We must not interpret *remove* to include all methods of eliminating obstructions because – as the Attorney General points out – *trim* and *cut* are themselves methods of eliminating obstructions. (Brief of the Ohio A.G., as Amicus Curiae, at p. 11.) For instance, the

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expel; exclude." *Id*. at 832. But the Easements are not free, quit, or delivered from vegetation after Ohio Edison sprays its chemicals; herbicides do not pluck vegetation up by the roots or root it up or out; nor do they put it out, thrust it out, disengage it from its environment, or expel it – they do not move it at all. In fact, Ohio Edison's TVM Program is explicit that its goal is to *control* vegetation, and it implements a five-year control cycle because vegetation regrows and new stems sprout from old stumps. (R. 20, Bloss Aff. at ¶¶ 14-18; R. 21, Maldonado Aff. at ¶¶ 10, 13-14.) They do not get rid of it, wholly destroy it, do away with it completely, or remove it to any other place. The dead, inhibited, or otherwise controlled plants remain where they are.

Easements state that trees are one type of obstruction. If *remove* gives Ohio Edison a right to "eliminate" trees by any method, then how could Ohio Edison cut down a tree without also having removed (i.e., eliminated) the tree? In that case, *cut* is a meaningless and unnecessary term – it provides no additional right and adds nothing to the sentence. Likewise, the Easements are clear that limbs can be obstructions. But, again, if *remove* gives Ohio Edison the right to "get rid of" limbs by any method, then how could Ohio Edison trim the limb from a tree without also having removed (i.e., gotten rid of) it? Under such an interpretation, Ohio Edison would have the exact same rights if the Easements instead read "and the right to ~~trim, cut and~~ remove at any and all times such trees, limbs, underbrush or other obstructions".

On the other hand, if we limit the meaning of *remove* to the first two dictionary entries (i.e., "to change the location of", "to move", or "to take away"), the provision makes much more sense. Suddenly, we have a clear alternative to trimming and cutting. Faced with an obstruction, Ohio Edison could either trim it, cut it down, or move it elsewhere. This interpretation creates no surplusage, satisfies the doctrine of *noscitur a sociis*, and gives Ohio Edison a method for handling non-vegetative obstructions like a kite tangled in its lines or a treehouse built too close to a tower. It would also cover Ohio Edison pulling a shrub out by the roots as it "changed the location of" the shrub.

3. Ohio Edison's surplusage counterarguments are deficient.

Ohio Edison tries to explain away the surplusage that its reading of *remove* creates. But all of its attempts fail.

a. Ohio Edison's claim that *remove* means "to remove entirely" is self-defeating.

Ohio Edison first claims that no surplusage is created by its unfettered reading of *remove* because *trim* allows it to trim a tree rather than having to cut it down; *cut* allows it to cut down a tree rather than having to trim it; and *remove* allows it "to 'remove' entirely – for example – a plant whose root structure threatens the foundations of line equipment, without being required to 'cut' or 'trim' any of its limbs first." (Appellant's Merit Brief at p. 17.) But if we adopt Ohio Edison's preferred definition of *remove* (to "eliminate", "eradicate", or "get rid of" by any method), then how would Ohio Edison's rights be any different if *cut* was deleted from the Easements? Does Ohio Edison believe that easements granting it the right to "trim and remove" trees would forbid it from cutting trees down?

Ohio Edison attempts to square this circle by casting *cut* and *remove* as distinct because cutting down a tree – which leaves a stump and root system behind – does not remove it *entirely*. In other words, Ohio Edison's view is that *remove* refers to complete removal, while *cut* is a specific method of dealing with vegetation *without* completely removing it. If *cut* were deleted from the Easements, therefore, Ohio Edison – by its own logic – would have to choose between trimming a tree and removing it entirely, roots and all. Simply cutting it down (while leaving the stump and root system in the ground) would not be allowed.

But, on the Corders' property, Ohio Edison seeks to *remove* vegetation by spraying it with herbicides, and *herbicides do not remove vegetation entirely, either*. They – like cutting – leave stumps and root systems behind (along with withered branches and stems, etc.). Ohio Edison's TVM Program is explicit about this; rather than fully removing stumps and root systems, it requires Ohio Edison to periodically spray them so that new stems do not sprout and multiply. (R. 20, Bloss

Aff. at ¶¶ 14-18; R. 21, Maldonado Aff. at ¶¶ 10, 13-14.) So if the right to *remove* – to be distinct from the right to *cut* – must mean *complete* removal, then herbicides cannot qualify. On the other hand, if *remove* means any method of removal, whether complete or not, then *cut* serves no purpose and is surplusage.

In other words, Ohio Edison's counterargument has merit *only so long as* remove *is construed narrowly*, as the Corders advocate. As stated above, reading *remove* as a standalone right only to "change the location of" or "move elsewhere" creates no surplusage and permits Ohio Edison to carry away a plant, roots and all. What turns *trim* and *cut* into surplusage is Ohio Edison's expansive view of *remove* as permitting it to "get rid of", "eliminate", or "eradicate" vegetation without limit as to method. And that is the interpretation Ohio Edison needs this Court to adopt, because it is the only one sufficiently broad to encompass spraying herbicides. Ohio Edison's problem is that reading *remove* expansively enough to cover herbicides turns *trim* and *cut* into surplusage, while reading *remove* narrowly enough to make sense within the context of the Easements excludes herbicide use.

b. *Overlapping* is just another way of saying *surplusage*.

Ohio Edison also claims that "trim, cut and remove" is a list of "freestanding and overlapping" rights. (Appellant's Merit Brief at p. 17.) The suggestion seems to be that there exists some middle ground between fully independent terms on one hand, and complete surplusage on the other, where the rights in question merely "overlap" a little bit. But – as described above – Ohio Edison's preferred definition of *remove* does not just overlap slightly with *cut*; it swallows *cut* entirely. And complete "overlapping" is just surplusage by another name.

c. Ohio Edison misrepresents *Beaumont v. FirstEnergy Corp.*

Ohio Edison then misrepresents *Beaumont v. FirstEnergy Corp*. as being on point here when it is not. Ohio Edison claims that *Beaumont*'s subject easement "allowed the utility to 'cut, trim and remove' threatening plants". (Appellant's Merit Brief at p. 18.) But this description is deceptive by omission; the properties in *Beaumont* were actually subject to multiple easements which combined to grant more expansive rights than those at issue in the present case:

> "In the instant case, it cannot be said that the three easements in question were without any provisions which specifically pertained to the issue of the presence of trees inside the easement premises. As was noted previously, the 1929 easement had a clause which gave the Illuminating Company the '**full authority to cut and remove any trees** *** which may interfere or threaten to interfere with the construction, operation and maintenance of said transmission lines.' Similarly, the 1979 easement, as set forth in the settlement judgment, expressly stated that the Illuminating Company was to have the '**permanent right and easement to cut, trim and remove any branches, tree or trees** *** to the extent such tree or trees may endanger the safety or interfere with any of the *** electrical transmission lines.' Finally, the 1989 easement contained a clause which granted to the Illuminating Company the '**full authority to trim, cut, remove or otherwise control at any and all times any trees, limbs, brush, or other obstructions** within said right-of-way or easement premises; ***.'

Beaumont at ¶ 20, emphasis added; *see also* Ruling at ¶ 27 ("[t]he easement language here is clearly not as broad as the language in the *Beaumont* case discussed earlier, which contained the additional phrase 'or otherwise control at any and all times'").

Additionally, despite the utility having the explicit right to "trim, cut, remove *or otherwise control*" vegetation, the dispute in *Beaumont* had nothing to do with herbicides. Rather, the utility sought to clear-cut trees which the landowners wanted trimmed instead, pursuant to its explicit (and repeated) right to *cut*. *Id*. at ¶¶ 8-11. The Eleventh District, therefore, had no cause to interpret the word *remove*, or to evaluate the utility's permissible methods of removal other than cutting.

The only question presented to the court was whether the utility could fully remove trees by cutting them down, which, of course, it could.[4]

d. The meaning of *removal* in the context of R.C. 2745.01(C) does not dictate the meaning of *remove* in the context of the Easements.

Finally, Ohio Edison cites *Hewitt v. L.E. Myers Co.*, 134 Ohio St.3d 199, 2012-Ohio-5317, 981 N.E.2d 795, claiming it demonstrates that Ohio's courts always read *remove* in the way Ohio Edison advocates here. (Appellant's Merit Brief at p. 18.) But Ohio Edison once again ignores context.

In *Hewitt*, this Court interpreted the term *removal* only as it is used in R.C. 2745.01(C), which codifies the intentional tort of "[d]eliberate removal by an employer of an equipment safety guard". In so doing, this Court noted that "[t]he court below defined the words as follows: * * * 'remove' means 'to move by lifting, pushing aside, or taking away or off'; also 'to get rid of: ELIMINATE.'" *Hewitt, supra* at ¶ 28, citing *Hewitt v. L.E. Myers Co.*, 8th Dist. Cuyahoga No. 96138, 2011-Ohio-5413, at ¶ 24. The Court then observed that, in the context of a statute dealing with workplace equipment safety guards, the definition of *remove* as meaning to "get rid of" or "eliminate" makes sense. The legislature clearly intended R.C. 2745.01(C) to cover actions "such as bypassing or disabling the guard" which do not physically take the guard elsewhere. *Id*. at ¶ 29. Critically, there were no surplusage concerns raised by interpreting the statute's use of *removal* this way.

[4] The *Beaumont* court does appear to use the term *remove* interchangeably with *cut* throughout its opinion, supporting the Attorney General's observation that *cut* is a specific method of eliminating obstructions that would be considered a form of removal under Ohio Edison's interpretation. (Brief of the Ohio A.G., as Amicus Curiae, at p. 11.)

But *Hewitt*'s analysis is irrelevant to the present case, which involves a different usage of *remove* in a different context. 1948 power line Easements are not a statute codifying intentional torts, and *Hewitt* did not attempt to define *remove* for all written agreements in Ohio, forever. Rather, easements must be evaluated on an individual basis, according to their particular language. *Corder II* at ¶ 25 ("the scope of an easement must be determined from the plain language of the conveyance that created it"); *State ex rel. Wasserman* at 669 (when an easement is created by express grant, "the extent of and limitations on the use of the land depend on the language in the grant"). Just as context makes clear that the legislature did not use *removal* in R.C. 2745.01(C) to mean changing the venue of litigation or dismissing someone from office, so does context make clear (for all of the reasons described above) that the Easements' drafters did not use *remove* to mean all methods of getting rid of, eliminating, or eradicating vegetation, without limit.

C. OHIO EDISON'S OTHER ARGUMENTS ARE ATEXTUAL.

Ohio Edison and the amici raise two other arguments. Because neither of them concerns the text of the Easements, however, they are meritless.

1. *Crane Hollow* does not intersect with this case.

Ohio Edison and the amici repeatedly invoke the "*Crane Hollow* principle", claiming that the Ruling confines Ohio Edison to "archaic" methods of exercising its easement rights. *See Crane Hollow, Inc. v. Marathon Ashland Pipe Line, L.L.C.*, 138 Ohio App.3d 57, 740 N.E.2d 328 (4th Dist. 2000). But this dispute has nothing to do with modern versus archaic technology; it is a textual dispute about how to interpret the word *remove*.

Crane Hollow stands for the proposition that an easement-holder may vary the mode of use of the easement by employing new technologies to exercise the rights clearly granted thereunder.

See, e.g., Crane Hollow at 69 (concerning an explicit right to "maintain" a pipeline, "aerial observation is permissible under the terms of the easement because it constitutes a mode of accomplishing the easement's purpose, i.e. maintaining the easement"); *Andrews v. Columbia Gas Transm. Corp.*, 544 F.3d 618, 624, 627-628 (6th Cir. 2008) (same); *Joseph Bros. Co., LLC v. Dunn Bros., Ltd.*, 2019-Ohio-4821, 148 N.E.3d 1260 (6th Dist.), ¶ 59 (concerning an explicit right to install an "identification sign", the easement holder's "modernization of its signage to include an electronic message board was permissible"). This means Ohio Edison is not restricted to axes and hand saws when it exercises its explicit right to *trim* or *cut* vegetation on the Corders' property; present-day tools like chainsaws and brush-hogs are permissible. Ohio Edison may also replace the Easements' original wooden poles and copper cables with steel towers and ACSR lines, as those are modern versions of "necessary structures, wires and other usual fixtures and appurtenances used for or in connection with the transmission and distribution of electric current". (R. 1, Compl., Ex. A, B, and C.)

But before we can apply the *Crane Hollow* principle to Ohio Edison's right to *remove* (if it has such an independent right at all), we must first decide what that word means in the context of the Easements. In other words, *we must answer the question actually presented by this case*. *Corder II* at ¶ 25 ("the scope of an easement must be determined from the plain language of the conveyance that created it"); *State ex rel. Wasserman* at 669 (when an easement is created by express grant, "the extent of and limitations on the use of the land depend on the language in the grant"). If *remove* means to "eradicate", "eliminate", or "get rid of" vegetation by any method, then *Crane Hollow* dictates that Ohio Edison may employ modern technologies (like (arguably) herbicides) to do so, rather than being limited to whatever existed in 1948. But if *remove* means only to "move" or "change the location of" obstructions, then herbicides do not enter the picture

at all – no matter when they were invented – because they do not "move" or "change the location of" anything. In that case, *Crane Hollow* merely tells us that Ohio Edison may use modern machinery to "change the location of" obstructions.

In other words, *Crane Hollow* has nothing to do with the question presented here. That is why – as the Public Utilities amici observe – "[t]he Seventh District's decision makes no mention of the *Crane Hollow* principle – or of any case law on the subject at all". (Brief of AEP, et al., as Amici Curiae, at p. 8.)

2. Ohio Edison passing its costs on to customers does not justify taking a landowner's property without compensation.

The Public Utilities amici claim that, if Ohio Edison loses here, "it is the public that will ultimately bear the cost of repeatedly obtaining new easements (via agreement or eminent domain)" containing a right to *spray* or *otherwise control* vegetation. (Brief of AEP, et al., as Amici Curiae, at p. 9.) Ohio Edison made a similar statement in its jurisdictional memorandum. (Mem. of Appellant in Supp. of Juris. at p. 10 ("such a proceeding will be followed inevitably by a new condemnation proceeding at ratepayer expense").) The argument seems to be that this Court should rule in Ohio Edison's favor because, if it does not, Ohio Edison will have to appropriate this particular "stick" from the Corders' "bundle" of real property rights. See, e.g., *Ohio Power Co. v. Burns*, 2022-Ohio-4713. And that would require Ohio Edison to compensate the Corders, an expense which Ohio Edison would then pass on to ratepayers in the form of higher electricity bills.

This argument is meritless for two reasons. First, because Ohio Edison charging its customers extra to cover its property-acquisition expenses has nothing to do with the Easements' text, which is where the answer to the question presented here lies. *Corder II* at ¶ 25 ("the scope of an easement must be determined from the plain language of the conveyance that created it").

And, second, because this argument would apply equally to any appropriation, even one of a brand new easement. Electric bills across the state might be lower if the Constitution let utilities take property without paying for it, but that would be a poor trade for the dispossessed landowners. "The property rights of an individual are fundamental rights, and 'the bundle of venerable rights associated with property is strongly protected in the Ohio Constitution and must be trod upon lightly, no matter how great the weight of other forces.'" *Ohio Power Co. v. Burns* at ¶ 22, quoting *City of Norwood v. Horney* at ¶ 38.

D. ANY AMBIGUITY SHOULD BE RESOLVED IN THE CORDERS' FAVOR.

Throughout this litigation, both the Corders and Ohio Edison have consistently argued that the Easements are not ambiguous. The trial court agreed, as have the Attorney General and the Public Utilities amici. If this Court, however, adopts the Seventh District's outlier view that the Easements are ambiguous, it should nonetheless find in the Corders' favor for two reasons.

First, as this Court previously determined, Ohio Edison's record evidence – in the form of various Affidavits from its employees and experts – is irrelevant to answering the question presented by this case: "[T]he exercise of administrative expertise is not needed to determine whether the language in the easements granting Ohio Edison 'the right to trim, cut and remove at any and all times such trees, limbs, underbrush or other obstructions' also authorizes it to use herbicides to control vegetation within the easements. Nor does that determination turn on a consideration of the requirements of Ohio Edison's TVM program, an expert opinion on the need to use herbicides, industry practice, or the PUCO's regulations." *Corder II* at ¶ 24. Though Ohio Edison spends pages of its brief exploring this same evidence, none of it relates to the intentions of the original parties to the Easements in 1948.

Second, Ohio Edison has practically construed the Easements as limiting its methods to trimming, cutting, and carrying away obstructions. "'[T]he practical construction made by the parties may be considered by the court as an aid to its construction when the contract is ambiguous, uncertain, doubtful, or where the words thereof are susceptible to more than one meaning, or when a dispute has arisen between the parties after a period of operation under the contract.'" *City of St. Marys v. Auglaize County Bd. of Comm'rs*, 115 Ohio St. 3d 387, ¶ 39 (2007), quoting *Consol. Mgt., Inc. v. Handee Marts, Inc.*, 109 Ohio App. 3d 185, 191, 671 N.E.2d 1304 (1996), quoting 18 Ohio Jurisprudence 3d 46, Contracts, Section 160 (1980); see also, *Natl. City Bank of Cleveland v. Citizens Bldg. Co. of Cleveland*, 48 Ohio Law Abs. 325, 335, 74 N.E.2d 273 (1947) ("Where a dispute arises relating to an agreement under which the parties have been operating for some considerable period of time, the conduct of the parties may be examined in order to determine the construction which they themselves have placed upon the contract * * *"). Here, the Easements have been in place since 1948. Over the decades, despite the development of herbicides as a tool for controlling vegetation, the imposition of the NESC, the infamous blackout of 2003, and the subsequent adoption of Ohio Edison's TVM Program, at no point prior to 2017 did Ohio Edison ever attempt to spray herbicides on the Corders' property. It has, therefore, practically construed the Easements as granting it the rights to trim, cut, and carry away, and no more.

IV. **CONCLUSION**

Does "trim, cut and remove" give Ohio Edison the rights (1) to trim, (2) to cut, and (3) to carry away obstructions? Or does it give Ohio Edison the rights (1) to trim, (2) to cut, and (3) to do whatever it wants to obstructions? Only the former interpretation makes sense, and none of those three rights countenance spraying chemical herbicides.

If Ohio Edison believes safely operating its facilities now requires it to control vegetation on the Corders' property by spraying herbicides, then Ohio Edison must appropriate or otherwise acquire that right (i.e., the right to *spray* or to *otherwise control*), as it would do for any necessary right the existing Easements do not grant.[5] As this Court has repeatedly made clear, "the bundle of venerable rights associated with property is strongly protected in the Ohio Constitution and must be trod upon lightly, no matter how great the weight of other forces." *City of Norwood v. Horney* at ¶ 38. That is why a utility must demonstrate the necessity of each right it seeks. *Ohio Power Co. v. Burns*, 2022-Ohio-4713. The plain meaning of a written easement does not suddenly swell to include a new right simply because Ohio Edison deems it necessary seventy years after the fact. (Nor does it do so in response to the imposition of a new code provision or regulatory scheme.) Instead, Ohio Edison must follow the appropriate procedure for acquiring that particular "stick" from the landowner's "bundle", by demonstrating its necessity and paying fair compensation for it.

No plausible interpretation of the Easements yields an unlimited right to *remove* by any method. The Easements, therefore, cannot grant Ohio Edison the right to control vegetation by spraying chemical herbicides. The Corders must prevail, and the judgment of the Seventh District should be affirmed.

Respectfully submitted,

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[5] Presumably, Ohio Edison would rely on the same evidence (via the testimony of various vegetation management specialists and forestry personnel) that it has already mustered in this case. Such evidence, though irrelevant here, could be material to establishing the necessity of an appropriation.

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CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2023, a true and correct copy of the foregoing was served via electronic mail, pursuant to Civ. R. 5(B)(2)(c), (f) and S.Ct.Prac.R. 3.11 (C), upon the following counsel:

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