**IN THE SUPREME COURT OF OHIO**

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| CRAIG D. CORDER, et al., | ) | Ohio Supreme Court Case No. 2023-0216 |
| | ) | |
| Plaintiffs-Appellees, | ) | Appeal from the Harrison County |
| | ) | Court of Appeals, 7th Appellate District |
| vs. | ) | |
| | ) | |
| OHIO EDISON COMPANY, | ) | Court of Appeals |
| | ) | Case No. 18 HA 0002 |
| Defendant-Appellant. | ) | |

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# REPLY BRIEF OF *AMICI CURIAE* AEP OHIO TRANSMISSION COMPANY, INC., OHIO POWER COMPANY, OHIO RURAL ELECTRIC COOPERATIVES, DAYTON POWER AND LIGHT COMPANY D/B/A AES OHIO, VECTREN ENERGY DELIVERY OF OHIO, LLC, D/B/A CENTERPOINT ENERGY OHIO, DUKE ENERGY OHIO, INC., AND COLUMBIA GAS OF OHIO, INC. IN SUPPORT OF APPELLANT

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## I. ARGUMENT

Appellees' merits brief steers a wide course around the rationale underlying the Seventh District's decision in apparent recognition that it cannot stand on its own two feet. Rather than argue in support of the Seventh District's ambiguity determination and urge this Court to adopt the three interpretative aids advanced by the court in support of its ultimate conclusion, Appellees almost entirely ignore the latter and chart a new course on the former. And for good reason: the Seventh District's interpretation of the easement language runs counter to well-settled rules of easement construction, and Appellees generally do not attempt to contend otherwise.

Appellees instead focus almost all of their efforts at convincing this Court that the easement language is not ambiguous and that resort to interpretative canons is therefore not necessary. In so doing, Appellees engage in a series of linguistic gymnastics to try to persuade this Court that the broad, ordinary and ubiquitous language of this public utility easement does not mean what it says. As noted in these *amici's* merits brief, *amici* agree with the cogent analysis of the language's plain meaning as set forth by Justice DeWine and then-Chief Justice O'Connor in *Corder v. Ohio Edison Co.* ("*Corder I*"), 162 Ohio St.3d, 2020-Ohio-5220 (and subsequently in the briefs of the Ohio Attorney General and Ohio Edison), and *amici* will not take up this Court's time by spilling more ink on the subject here. *Amici* will simply note that Appellees' "plain language" interpretation of the word "remove" would require this Court to ignore both the dictionary definition of the word (per *Webster's)*, as well as this Court's own definition of the term (per *Hewitt v. L.E. Myers Co.*, 134 Ohio St.3d 199, 2012-Ohio-5317, ¶ 29) while simultaneously flipping an express easement "right" in favor of Ohio Edison (to broadly remove encroaching

vegetation) into an implicit "obligation" in favor of the landowner (requiring Ohio Edison to remove any vegetation it has trim or cut—and to do nothing more than that).[1]

As noted in their merits brief, *amici* principally write to urge this Court to rectify three fundamental easement interpretation errors committed by the Seventh District in its decision that, if left uncorrected, would upend easement law in this State and create a significant risk of harm to the public who must ultimately depend on the enforceability of these same easement terms for reliable and cost-efficient utility services.

### A. Easements Should Be Interpreted to Allow for Modern Advancements.

To their credit, Appellees implicitly acknowledge the validity of the "*Crane Hollow* principle," which mandates that easements must be interpreted to permit the dominant estate to vary the mode and use of the easement by employing new technologies and methods. [Appellees' Merits Brief, at 17-18; *Amici* Merits Brief, at 5-10.] Indeed, Appellees even appear to acknowledge that if the full *Webster's* definition of "remove" is used by this Court—as it should be—the *Crane Hollow* principle would allow for the use of herbicides by Ohio Edison. [Appellees' Merits Brief, at 18.] On these two points, Appellees and *amici* appear to be in near complete agreement.

But *amici* disagree with Appellees' ultimate conclusion that the principle has no real application here and that the Seventh District did not mention the principle because of its irrelevance. [*Id.*, at 19.] That is not so. Although one can certainly argue that resort to the *Crane*

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[1] It would also require the Court to find, in the name of surplusage, that traditional belt-and-suspenders approaches to easement and contract drafting—using multiple terms to define a right or obligation as broadly as possible so that nothing is inadvertently missed—actually *narrows* the right or obligation. This Court should avoid that outcome. *See, e.g.*, *Beverage Holdings, LLC v. 5701 Lombardo, LLC*, 159 Ohio St.3d 194, 2019-Ohio-4716, 150 N.E.3d 28, ¶ 19 ("Ultimately, it is better to put theories of surplusage to the side and to simply look to the text of the contract.").

*Hollow* principle might not be necessary if this Court concludes the challenged language is unambiguous, that is not the conclusion which the Seventh District reached. It found that the language *was* ambiguous and then principally reached its "formalistic" and "hypertechnical" definition of the easement language based on its conclusion that herbicides must not have been intended by the parties because they were never previously used by Ohio Edison and were not much in use at the time of the easement's execution in 1948. [*Corder I*, at ¶¶ 36, 40; *see also* App. Op. at ¶ 21.] That conclusion is manifestly at odds with the *Crane Hollow* principle in Ohio and the settled law on this issue throughout the country, and this Court should correct this significant error. [*Amici* Merits Brief, at 5-10.]

### B. Easement Holders Should Not Be Obligated to Demonstrate That a Proposed Use Is Absolutely Necessary.

The Seventh District also erred in its apparent finding that "remove" does not include the right to use herbicides because herbicides are not "absolutely" necessary. [App. Op. at ¶ 26.] This was also plain error and a near reversal of the applicable standard. As detailed in *amici's* merits brief, the law is clear that the proper test to be applied to any proposed easement use is whether the use is "reasonably necessary and convenient." [*Amici* Merits Brief, at 10-11.] Appellees do not contest this standard in their merits brief, and *amici* urge the Court to reiterate its applicability in its decision.

### C. Easements Should Be Interpreted Reasonably and Not Against the Drafter.

Appellees continue to urge this Court to resolve any ambiguities in the easement language against Ohio Edison, though they no longer do so for the same reason as the Seventh District. The Seventh District construed the easement language against Ohio Edison on the basis of *contra preferentem*. [App. Op. at ¶ 20.] But as detailed in *amici's* merits briefs, that ordinary rule of contract interpretation runs into a contrary rule when it comes to grants of interests in property—

that such grants must instead be construed against the grantor/landowner. [*Amici* Merits Brief, at 11-13.]

Appellees do not dispute the propriety or applicability of this interpretative canon and no longer urge the application of *contra preferentem*. Appellees instead pivot their preferential treatment plea in another direction—asking the Court to construe ambiguities against Ohio Edison because it has never before used herbicides on the property. [Appellees' Merits Brief, at 20-21.] Appellees argue that, in the event of doubt, it is permissible to make a "practical construction" against Ohio Edison because of past non-use. [*Id.* at 21.] But Appellees' argument is nothing more than an attempted end-run around the *Crane Hollow* principle. Easements must be construed to allow for new means, methods, and technologies, and parties to perpetual easements must be presumed to have contemplated these possibilities. In short, there is no sound legal basis for construing the easement language against Ohio Edison and, if the easement language is to be construed in any party's favor, it ought to be Ohio Edison, who is both the grantee of the easement and the party charged with supplying reliable and cost-efficient electric service to the public.[2]

## II. CONCLUSION

*Amici curiae* respectfully urge this Court to adopt Ohio Edison's Proposition of Law and reverse the decision below.

[2] Contrary to Appellees' contention, neither *amici* nor Ohio Edison argues that the Court should find in Ohio Edison's favor because the cost of maintaining utility easements are ultimately borne by the public. [Appellees' Merits Brief, at 19-20.] Rather, the cost of maintaining utility easements demonstrates one of the reasons why courts have traditionally interpreted easement language broadly and to allow for new methods and evolution in uses. If perpetual easements are a prisoner of their era and construed hyper-technically against the easement holder—as the Seventh District has done—it would be very difficult indeed for easement holders to efficiently and continually render the service underlying the easement.

Respectfully submitted,

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