IN THE SUPREME COURT OF OHIO

CRAIG D. CORDER, et al.,	)	Case No. 2023-0216
	)	
Plaintiffs-Appellees,	)	On Appeal from the
	)	Harrison County Court of Appeals,
v.	)	Seventh Appellate District
	)	
OHIO EDISON COMPANY,	)	Court of Appeals
	)	Case No.: 18 HA 0002
Defendant-Appellant.		

REPLY MERIT BRIEF OF APPELLANT, OHIO EDISON COMPANY

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I. INTRODUCTION

This case was accepted for review upon a single proposition of law, asserting that Appellee's erroneous interpretation of the easement language frustrates the entire purpose for which the Easements were granted and the important public policy considerations embodied in R.C. 4905.22. In their briefing, Appellees have fully abandoned the doctrinal canon that was central to the reasoning of the Seventh District Court of Appeals — simply construing an isolated word or phrase against the drafter. Instead, to generate the constraint they want, Appellees urge the Court to read the key sentence of the Easements against itself. This leads to a result unsupported by the text that both frustrates the Easements' purpose and undermines Appellant's ability to meet its statutory duty to enhance the safety and reliability of the power grid.

The easement text at issue does not create the constraint that the Corders claim to see. It lays out a broad array of rights for the utility to serve the public interest, but when it comes to the *methods* for exercising those rights, in order to prevent fires, blackouts, and other disasters, the document is silent. Under Appellees' distorted reading, the key Easement sentence covering utility maintenance rights would grant the utility a broad and general right to maintain the easement space in its discretion, using best practices to promote the reliability of the grid and protect public safety — with one stark exception, for vegetation management.

Appellees contend that while the utility is unfettered in its other activities, it may manipulate plants encroaching on the lines only in a narrowly circumscribed way. The utility may inspect and repair the lines using any method, at any time, and may "remove" any other dangerous obstruction (an abandoned vehicle, an owl's nest, a softball backstop). But Appellees contend that the special mention of "vegetation" is intended to narrow, not to broaden, the utility's scope. And because there are three verbs rather than one listed in connection with vegetation, the utility may never interfere with a plant, or alter the growth of any part of a plant, unless it does so with a blade.

The text does not support this interpretation. Drafting with public safety in mind, the signatories on both sides plainly sought more scope for vegetation management, not less. In their zeal, throughout every piece of the clause, they agreed on a wide array of overlapping rights — belt-and-suspenders language to help prevent future disputes, in a style that Appellees now, perversely, label "surplusage." The text is so clear that in the face of Justice DeWine's comprehensive analysis the last time the case was before this Court, the lower courts on remand did almost nothing to explain how the words of the text support their holdings. *See* 162 Ohio St.3d 639, 2020-Ohio-5220, ¶¶ 38-44, 166 N.E.3d 1180 (DeWine, J., concurring in part and dissenting in part) ("*Corder I*") (explaining why the Corders' reading "makes little sense in context"). Appellee's brief (hereinafter "Opp.") attempts to construct such a reading, but falls far short.

Simply put: the formal Easements use expansive language for the benefit of the dominant estate. Not even manipulating the rules of interpretation in hypertechnical fashion allows for a reading supporting Appellees' preferred constraint on methods. And it is uncontroverted that given the state of their property, the management method in question — state-of-the-art herbicide targeting only incompatible vegetation — is "the best maintenance practice and the one accepted generally in the utility industry to maintain safety and reliability of the line." (Bloss Aff. ¶ 19.) There is nothing special about this text or these facts to deactivate the principles of public policy and sound contract interpretation on which the Court accepted jurisdiction.

Precedent of this Court holds squarely that constraints on easement rights must appear in the language of the document. Because the actual text of the Easements is clear, and because the commonsense readings of the key verbs are so far superior to the distorted versions that Appellees say they perceive, the holdings below should be reversed.

II. ARGUMENT

Appellees' brief tacitly concedes that the Court of Appeals cannot be affirmed under the reasoning it used. To decide the outcome below, the Seventh District resorted to the doctrine of *contra proferentem*, or "construction against the drafter." *Corder v. Ohio Edison Co.*, 2022-Ohio-4818, 205 N.E.3d 616, ¶ 20 (7th Dist.) ("*Corder II*") (to resolve the central ambiguity, "the contract is construed against the drafter or the party with superior bargaining power, which in this case would be Ohio Edison"); *see also id.* (citing no record evidence of the bargaining). Ohio Edison posited, in its opening brief, that there was "no precedent in which this canon was *ever* used to limit a utility grantee's method of exercising a stated easement right under Ohio law." (Emphasis added.) (Appellant's Br. at 16 (citing, *contra*, *Malcuit v. Equity Oil & Gas Funds, Inc.*, 81 Ohio App. 3d 236, 240, 610 N.E.2d 1044 (9th Dist. 1992).) Instead of citing such a case, from any jurisdiction, Appellees entirely omit the doctrine, under any of its names, from their brief. The Corders have thus abandoned the novel and indefensible argument on which the Seventh District relied at a critical point in its reasoning. Thus the Court should uphold Ohio Edison's Proposition of Law as framed, putting the "last-resort canon" of *contra proferentem* back in its proper place.

Seeing that they must start again from scratch, Appellees turn rightly to the Easements' text. But rather than presenting a unified and sensible reading of the key sentence of the Easements — much less a reading that accords with the Easements' purpose — the Appellee brief undertakes a series of disjointed exercises under the theme of confusion and uncertainty. Single words, pairings of words, and other segments of text zoom into and out of focus. According to Appellees, the sentence at issue is "not clear" as to what rights are created (Opp. at 5); one of its verbs "could be" antecedent to the others (*id.,* subtitle text); and it involves a "chameleonlike" conjunction that the Court is somehow required to interpret "most ordinarily" (*id*. at 7). Appellees go on to say the sentence, for all its overlapping thoroughness, omits a key clarifier "otherwise" that would have

changed everything (*id.* at 9), and as a result the third verb in the list, *remove*, "is joined to *trim* and *cut*, not alternative to them" (*id*. at 8). Then, in order to allay all the confusion and uncertainty they see, Appellees say it is vital to "limit the meaning of the word *remove* to the first two dictionary entries." (*Id.* at 12.) This move gives away the game.

To resolve all the awkwardness that Appellees have invented, their brief exhorts the Court to take an extraordinary step that will "explain away the surplusage" that Appellees perceive, and also lead to the substantive result that Appellees prefer — to forbid the use of best practices to manage their out-of-control and highly regenerative vegetation. (*Id.*) But Appellees have manufactured for this litigation all the purported uncertainty; it does not arise from the text, either its grammar or its terminology. Any of the dictionary definitions of *remove* fits. Reading the ordinary words of the sentence through the lens of common sense, as Justice DeWine has already done, gives it a simple meaning — one that aligns with the obvious intent of the drafters of the Easements to promote safety and reliable electric service. *See Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St. 2d 241, 248, 374 N.E.2d 146 (1978) (rejecting landowner's argument that ancient terminology did not include updated uses for a utility easement: "Because the parties executing this agreement did not choose to qualify the terms [identifying the utility's rights of use], we must therefore assume that they intended no restrictive meaning.").

Remove means *remove*. Appellees' efforts to muddy the waters, for this easement and thousands of others just like it, should be rejected in light of the manifest purpose of the clause and the document. *See Corder I*, ¶ 41 ("Rather than zero in on the meaning of a phrase in isolation, [the Court] should consider the text as a whole.") (citing *Great Lakes Bar Control, Inc. v. Testa*, 156 Ohio St.3d 199, 2018-Ohio-5207, 124 N.E.3d 803, ¶ 11).

A. WITH THE RATIONALE OF THE SEVENTH DISTRICT ABANDONED, *BUCKEYE PIPE LINE* RESOLVES THIS CASE

Decided forty-five years ago on the principles of broad interpretation for utility easements laid out in more detail below, *Buckeye Pipe Line* resolves this case as it is now presented on the merits. 53 Ohio St. 2d at 241, paragraph two of the syllabus. Under the syllabus rule of that case, "Common words appearing in a written [utility easement] instrument will be given their ordinary meaning unless *manifest absurdity* results, or unless some other meaning is *clearly evidenced* from the face or overall contents of the instrument." *Id.* (emphasis added). In other words, the scope of a written easement must be determined from the words on the page, where the parties are expected to have stated any restrictions. *See Wasserman v. City of Fremont,* 140 Ohio St. 3d 471, 2014-Ohio-2962, 20 N.E. 3d 664; *Joseph Bros. Co., LLC v. Dunn Bros., Ltd.*, 2019-Ohio-4821, 148 N.E.3d 1260, ¶ 49 (6th Dist.) ("limitations" on easement rights must be found in the text or not at all). Imposing limits judicially — here, forbidding the use of herbicides as a method of removal — "would be tantamount to rewriting the agreement and establishing restrictions not expressed by the parties thereto." *Buckeye Pipe Line* at 247.

Appellees have not attempted to defend the Seventh District's misuse of an inapposite canon. With that approach eliminated, all the Court needs to do is to apply the rule of *Buckeye Pipe Line* to the text at issue.

B. THE EASEMENTS CONFER THE RIGHT TO *REMOVE* VEGETATION, AND ARE SILENT AS TO REMOVAL METHOD

The Opposition brief undertakes several methods to erase the word *remove* from the text, or to claim it involves something besides the right to eliminate threatening vegetation using the best available tools. In the end, the outcome of these exercises is always the same: in the context of herbicides, Appellees urge the Court to ignore inconvenient dictionary definitions that are perfectly comprehensible in context. Yet the word has been consistently found by Ohio courts to

include just those definitions by default. *See, e.g.*, *Hewitt v. L.E. Myers Co.*, 134 Ohio St.3d 199, 2012-Ohio-5317, 981 N.E.2d 795, ¶ 29 (holding that under "ordinary usage" for physical objects, "remove" means "get rid of or eliminate," and includes "disabling" or "otherwise eliminat[ing]" a thing, not just "physically removing" it).

Recognizing that ordinary usage is stacked against them, Appellees repeatedly say that in their particular case, the "context" dictates a narrow reading of the expansive verb *remove*. (Opp. at 8, 11, 14, 16, 17.) Notably, Appellees fail to consider the Easement's purpose as its "context" when reading the word *remove*, even though this is necessary in order to read the document as a whole, to give meaning to the whole grant and not individual words in isolation. *See Shops at Boardman Park LLC v. Target Corp.*, 7th Dist. Mahoning No. 13 MA 0188, 2016-Ohio-7283, ¶ 12. The Corders instead attempt to alter the "context" by improperly invoking pseudo-facts that are not in the record: namely, their "health concerns," and their alleged interest in "organic farming practices." (Opp. at 2.) No competent evidence supports these assertions, which, if true, could have been easily presented in the trial court and included in the record below. Because they are not in the record, these assertions should be removed from the case as presented.[1]

Appellees' rules violation is doubly misleading in light of the record evidence showing that organic farmers *do* get special treatment under Ohio Edison's Vegetation Management Plan. (*See* Aff. of Kate Bloss, ¶ 29 ("herbicides will not be applied" in proper cases); *id.* Ex. B, TVM Contractor Specification, at #00018 (outlining procedure to avoid herbicide application for a property owner who has organic "USDA certification" or has "entered into the 3 year process to obtain certification"); *see also* Affidavit of Salvatore Quattrocchi ("Quattrocchi Aff.," ¶ 8

[1] Because the Court can readily neutralize these pseudo-facts without physically erasing them from the brief, Ohio Edison has not made a motion to strike this improper sentence. *See, e.g.*, *State ex rel. Maxwell v. Brice*, 167 Ohio St.3d 137, 2021-Ohio-4333, 189 N.E.3d 771, ¶ 15.

(explaining why such herbicides are designed and applied to be "encapsulated into the plant" and cannot reach the groundwater on the property).) Whatever interest they may have in organic farming, the Corders did not choose to include it in the litigation, and they have never invoked the appropriate procedure; indeed, evidence below suggested that they use herbicides themselves on the land when it suits them. (*See* Quattrocchi Aff., Ex. A at 8, and photographs at PDF pp. 50-53.)

But the Corders' attempt to change the evidentiary record, in violation of the Rules, does not matter. Under the law, in order to impose a constrictive reading on the text of an easement, Appellees' burden is to show that the broader reading of the removal right creates a "manifest absurdity" or is barred by "some other meaning [that] is clearly evidenced from the face or overall contents of the instrument." *Buckeye Pipe Line*, 53 Ohio St. 2d at 241, 374 N.E.2d 146. The Corders cannot meet this burden; indeed, as Justice DeWine has explained, it is Appellees' interpretation that "actually makes little sense in context." *Corder I,* ¶ 41.

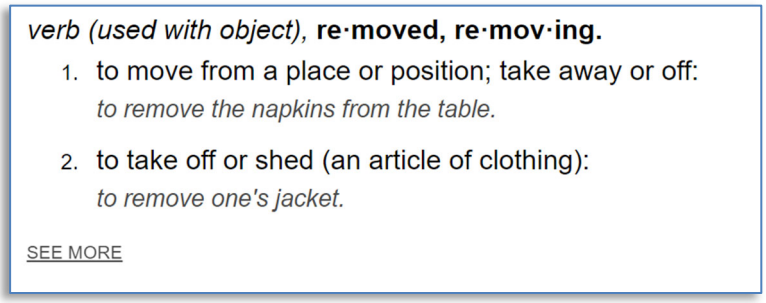
Ohio Edison's reading aligns with the purpose of the Easements and the aims of its drafters, and all the dictionaries support it squarely. (See Opp. at 10 (acknowledging clear and available definition of *remove* from 1948, at the time of the Easement: "to get rid of [without] moving; to eradicate; to eliminate").) None of the proposed strategies of distorting the text or the word *remove* is viable, and all the supposed problems with Ohio Edison's reading evaporate under scrutiny.

1. Innovative Strategies of Interpretation Do Not Erase the Right to Remove

The Court of Appeals and the Opposition brief have proposed five techniques to erode or diminish the broad power to *remove* that is conferred in the text of the Easements — formal documents beginning with the declaration "Know all men by these presents" and ending with the declaration that the rights conferred are "To have and to hold… forever." (Aff. of Bloss Ex. A.) Each of these methods to distort and diminish the removal right fails.

a. Misreading Neutral Authorities

On its path to misapplying a disfavored canon, the Court of Appeals chose to ignore certain dictionary definitions. In the decision under review, it merely re-adopted its flawed citation to Dictionary.com. *See Corder II*, ¶ 27. Upon loading, the webpage it cited looks like this:

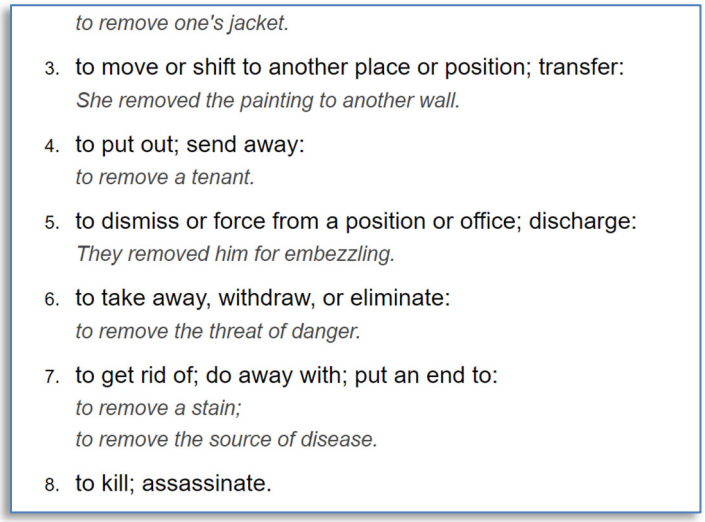


verb (used with object), **re·moved, re·mov·ing.**

1. to move from a place or position; take away or off:
   to remove the napkins from the table.
2. to take off or shed (an article of clothing):
   to remove one's jacket.

SEE MORE

See Corder I, ¶ 43 (listing only these definitions and examples, verbatim, as the "alternative definitions," and failing to note the option to "see more"). But when the browser opts to *see more*, the definition webpage expands instantly:



to remove one's jacket.

3. to move or shift to another place or position; transfer:
   She removed the painting to another wall.
4. to put out; send away:
   to remove a tenant.
5. to dismiss or force from a position or office; discharge:
   They removed him for embezzling.
6. to take away, withdraw, or eliminate:
   to remove the threat of danger.
7. to get rid of; do away with; put an end to:
   to remove a stain;
   to remove the source of disease.
8. to kill; assassinate.

Instead of revisiting the website in 2022 to see the full list, the Seventh District insisted on its prior findings, ignored the Ohio case law examining the word, and rejected any broader reading. It insisted, "[a]s we stated in *Corder I*, … the word 'remove' [by itself] creates the limitation

[against herbicide]." (*Corder II*, ¶ 27; *see also id.* (noting that "many other words or phrases" exist, besides the verb *remove*, "that could have been used").)

Appellees do not attempt to defend the Seventh District's approach, for two reasons besides the selective use of only preferred definitions of the word. First, as noted above, Ohio courts have repeatedly said that the broader meaning of *remove* — to "eliminate" or "disable" — is ordinary, and is present by default where it is sensible in the context. *See Hewitt*, 134 Ohio St.3d 199 at ¶ 29, 981 N.E.2d 795; *accord State v. Workman*, 2015-Ohio-5049, 52 N.E.3d 286 (3d Dist.); *Trish's Café & Catering, Inc. v. Ohio Dept. of Health*, 195 Ohio App.3d 612, 2011-Ohio-3304, 961 N.E.2d 236 (10th Dist.); *Fickle v. Conversion Techs. Intern., Inc.*, 6th Dist. Williams No. WM-10-016, 2011-Ohio-2960; *Widen v. Pike Cty.*, 187 Ohio App.3d 510, 2010-Ohio-2169, 932 N.E.2d 929. The Appellees must find something special in the context of a utility easement, or in the parties' negotiated language, that disqualifies this definition.

Second, precedent of this Court prohibits the post-hoc creation of use constraints where they do not appear in some form in the text of a utility easement. *Buckeye Pipe Line*, 53 Ohio St. 2d at 243 (rejecting all of landowners' arguments to the effect that "the terms 'oil' and 'gas' as employed in the right-of-way agreement had limited meanings" at the time of the utility-easement negotiation); *id.* (rejecting all of landowners' arguments that the term "alongside of" set an implied limit to the number of pipelines). As in *Buckeye Pipe Line*, a broad reading of an easement does not create "manifest absurdity" simply because it *could*, in theory, allow for an abusive result: other constraints and regimes will come into play without the intervention of a court, and parties negotiating easements know how to protect themselves from abuse on the issues that matter to them. *Id.* (even without regulatory oversight, explicit "liability-for-damages clause would

discourage appellee from intruding too much into the operations of the appellants" with excessive deployment of pipelines).

b. Inventing Definitions of Other Words, to Change What 'Remove' Means

Appellees first contend that all three verbs in the trinity of vegetation-management rights must be distinct and alternative to each other. They insist on this requirement because, they say, *trim* and *cut* are entirely distinct from each other — *cutting* "kills vegetation," while *trimming* just leaves something "smaller and more manageable." (Opp. at 6.) No authority is cited for this linguistic claim, and none exists. Under ordinary English, there is no reason that a limb could not be *cut*, leaving its shoot, alive, to regrow. A tree *trimmed* of enough leaves dies for lack of nourishment. Further, it might be sensible both to *cut* a certain limb (reducing its length) and to *trim* what is left (reducing its width) — a landowner cannot insist on one or the other.

And more to the point: it is undisputed that *cutting* the Corders' rampant woody vegetation does not "kill" it, as Appellees insist it must by definition. The stumps grow back and multiply. (Maldonado Aff. at ¶ 10) (on the Corders' property, the incompatible vegetation … stumps now have numerous stems since they were not treated by herbicides" after cutting). There is shared terrain for the three words in the sentence, putting them squarely in the realm of *noscitur a sociis*. (*See* Brief of the Ohio Atty.Gen. as *amicus curiae*, at 11.)

Trim and *cut* are similar and overlapping, and *remove* likewise overlaps with each of them. They can all occur severally, together, or sequentially. (*See, e.g.*, Affidavit of Salvatore A. Quattrocchi, Ex. A, at 3 (specifying herbicide removal methods for the Corders' property that include "treatment following hand cutting of woody brush").) There is no tension here among the related options. None of the words is identical, none excludes the others, and none is redundant: this is the hallmark of a sound reading of such a list.

c. Inventing Obligations of the Utility, to Change What 'Remove' Means

In the course of dissecting and distorting the Easement text, Appellees urge the Court to read the word *remove* unlike every other word in the lengthy sentence that contains it. On their preferred reading, *remove* is a command to the utility rather than an option given to it. Regardless of the circumstances, Appellees claim, this one word in a paragraph conferring rights creates an obligation, and not a right — appearing in the document just in order to require, in all cases, full cleanup of all cut timber, brush, and leaves.

Nothing in the paragraph, the grammar, or the context supports this reading. The paragraph in question exists in order to confer utility maintenance rights. Every verb, and almost every word,[2] grants the utility an expansion of its right to do something related to the easement land where it has been given a right-of-way. There are no exceptions in sight among the verbs: though it could not do so before, under the Easement clause the utility has the rights to "erect, inspect, operate, replace, repair, patrol, … operate," "[make] ingress, [make] egress," "trim, cut, and remove" on the Corders' property. (Bloss. Aff. Ex A.) Of these twelve permitted actions listed in the paragraph, Appellees contend that one is different from all the rest — the verb "remove" is not an option *granted* to the utility, but a mandate *imposed* upon it. Even as it eliminates some definitions of the word, this reading creates duties for the utility that did not exist before. If true, this would be a stark anomaly, and unsurprisingly, nothing in the language calls for this reading.

[2] Only one other word in the seven-line paragraph can even arguably be construed as intended to limit utility rights: the utility is allowed to install only "usual" fixtures. (*Id.*) But even this word is more open-ended than it first appears. The document does not specify that fixtures must be "usual" at the time the Easement was signed. Instead, in the eyes of the law and of common sense, "usual" means "usual at the time of installation": as Appellees acknowledge (Opp. at 18), modern electrical components, enhancing safety and reliability, are permitted by a clause like this.

Plainly, the purpose of this paragraph is to confer rights on the Grantee utility, and to make them effective. It is in the *next* two paragraphs that rights are respectively reserved to the Grantor and conferred on the Grantor. (*Id.*) The last verb in the sentence, *remove*, would stick out like a sore thumb if read as the Corders construe it. The purpose for every word of the rest of the clause is to confer expansive rights, in broad and overlapping language, and generally to entrust their exercise to "the judgment of Grantee," the utility that is charged with promoting public safety and grid reliability. (*Id.*) That was the "great concern" of the drafters. *See Peacock v. Lubbock Compress Co.*, 252 F.2d 892, 893 (5th Cir. 1958). The word *remove* is no exception among its neighbors.

The Corders protest that an open-ended reading of "trim, cut, and remove" could lead to cut timber being left behind in place, something that they imply would not be appropriate on their land. (Opp. at 6-7.) But the record shows it is clearly appropriate on *some* land, even today, and can sometimes be a boon to the landowner. (*See* Aff. of Kate Bloss, Ex. B, TVM Contractor Specification, at 000011 (state-approved plan describing how to tidy residue and leave it in place); *see also id.* Ex. E, at 18 (cut timber is "often best left for the property owner …"; "leave the wood that is too large to be chipped in handling lengths[,] for the property owner to cut into final firewood lengths").)

As a practical matter, the hypothetical about unsupervised "abuse" by a utility is misplaced: the instruments and the state create other protections. *See Buckeye Pipe Line*, 53 Ohio St. 2d at 243, 374 N.E.2d 146 (landowners were fairly protected against abuse through easement clause setting compensation for any harm to their land). (*See* Aff. of Bloss Ex. A (liability-for-damage clause protecting the Corders under their Easements against abuse).) In today's context, a landowner subjected to "abuse" (Opp. at 7) in the unreasonable exercise of utility maintenance

rights has clear recourse: the Public Utilities Commission of Ohio ("PUCO"). *See Corrigan v. Illuminating Co.*, 122 Ohio St. 3d 265, 2009-Ohio-2524, 910 N.E.2d 1009, ¶ 20 (where utility had removal right under contract language, scrutiny of removal methods was for the PUCO). The Corders' arguments are misplaced policymaking, rather than contract interpretation.

d. Misreading the Authorities on the Flexibility of 'And'

Appellees acknowledge, as they must, that in legal documents the word 'and' is often read disjunctively, to mean 'or.' (Opp. at 7-8.) *See Peacock*, 252 F.2d at 893. That rule "compelling" courts to use common sense was invoked in the nineteen-fifties as "ancient learning, recorded authoritatively for us nearly one hundred years ago, echoing that which had accumulated in the previous years and forecasting that which was to come." *Id.* (citing *United States v. Fisk*, 70 U.S. 445, 448, 18 L.Ed. 243 (1866)). To offset this body of authority, Appellees cite a case that indeed involves a strict reading of the word "and" — a reading that is sometimes required to avoid an absurd result. *See Shaw v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 605 F.3d 1250, 1253 (11th Cir. 2010).

In the *Shaw* case, an insured's covered condition was defined to include three things: certain specified types of injury, *and* incapacity to work, *and* ongoing physician care as appropriate. *Id.* at 1252. Here, 'and' could not mean 'or.' It made no sense to say the insured only had to meet one of the prongs, since being under the care of a physician could not possibly be a catch-all triggering coverage. *Id.* at 1255. The purpose of a definition sentence is to narrow the range of possibilities, not to extend it.

Lists of available options are a different matter. And as the *Shaw* court notes, even where a list drafter is linking "mutually exclusive concepts," the better reading usually is the more expansive one — being required to pay "medical and burial expenses" means paying both sums, not choosing one or the other. *Id.* at 1254. And in the leading case on which *Shaw* relies,

exempting "ginning and compressing" activities from federal regulation meant exempting both kinds of business, and not only businesses that did both: "The great concern of Congress was to exempt agriculture as such from the Act." *Peacock*, 252 F.2d at 893. A Court is supposed to follow the lead of a document drafters' "great concern," rather than a subliminal implication.

Appellees note that the Easements also sometimes use the word *or*, and opine that their reading "makes far more sense," according to what they call the "general rule." (Opp. at 8.) But in language appearing just before the extended quote Appellees provide, the *Shaw* case explains the true governing rule for the "chameleonlike" word 'and': "It is an established principle that 'the word "or" is frequently construed to mean "and," and vice versa, *in order to carry out the evident intent of the parties*.'" *Shaw*, 605 F.3d at 1253 (11th Cir. 2010) (quoting *Noell v. Am. Design, Inc.*, 764 F.2d 827, 833 (11th Cir. 1985) (bracketing altered and emphasis added). No "general rule," from the Eleventh Circuit or elsewhere, is allowed to prevail on its own against the thrust of a sentence and a document. And as shown above, even the "general" rule in Appellees' authority is chosen to create broader readings, not to construe a text against itself.

If the word takes on the "color" of its surroundings (Opp. at 7), the word *remove* here must be read in a manner consistent with the rest of the document and the sentence. The purpose of the Easements is to enable the activities of the dominant estate, a utility that serves the public interests in safety and reliability. And every piece of the clause at issue is drafted to confer rights on the utility, to promote those interests. Appellees cannot credibly claim to see a bright-green chameleon, all by itself, in a document of black and white. *Shaw*, 605 F.3d at 1254 (11th Cir. 2010) ("[T]he context in which the word appears often resolves any superficial uncertainty.").

e. The "Canon Against Surplusage"

Since all the tactics of reading mustered by Appellees fail, there is nothing wrong with the sentence as it stands. In several places, it lists overlapping rights, though they are also often distinct

from each other in common-sense ways. Multiple verbs are used instead of just one, with the intent of preventing hypertechnical readings — and ironically, opening the document to the accusation of "surplusage." But there is no surplus, and each word is there for a reason. If it stood alone, the right to "trim" might seem to exclude the right to "cut" an entire limb or tree; or the right to "cut" a tree might seem to exclude the right to "trim" dangerous limbs or "remove" root systems that threaten utility fixtures. *Cf. Andrews v. Columbia Gas Transmission Corp.*, 544 F.3d 618, 631 (6th Cir. 2008) (where trees' roots threatened underground pipeline, "the trees were inconsistent with the easement rights of Columbia Gas, [and] the company was authorized to remove them"). The document chooses an "all of the above" approach to drafting.

Here and elsewhere, the drafters on both sides used multiple words where one might have sufficed, with the plain intent of anticipating and defeating cramped readings of the vegetation-management right. (*Cf.* Bloss Aff. Ex. A (allowing for both "fixtures *and* appurtenances" to be installed; for both "transmission *and* distribution" of electricity; and for landowners to "remise, release *and* forever quit-claim" the rights related to an "easement *and* right-of-way")). In the case of the key vegetation language, the phrase simply allows for multiple methods to be applied, together or in sequence, depending on the type and degree of obstruction. Many of the contemplated obstructions, in fact, could never be trimmed or cut. Perversely, however, Appellees turn this belt-and-suspenders approach against the text. They say that the listed terms must each be read narrowly, and that they may never overlap with each other.

"But surplusage does not always produce ambiguity, and the plain meaning of the [text] is always preferred." *State ex rel. Plain Dealer Publ'g Co. v. Cleveland*, 106 Ohio St. 3d 70, 77, 2005-Ohio-3807, 831 N.E.2d 987, ¶ 40 (citation omitted). Even if any of Appellees' readings identified actual tensions in the text of the key clause — which they do not — the use of excessive

verbiage is not a basis for reinventing a text. The theory of surplusage in statutory interpretation is that legislatures are concise, and "no provision should be construed to be entirely redundant." *Kungys v. United States*, 485 U.S. 759, 778, 108 S. Ct. 1537, 99 L. Ed. 2d 839 (1988). But Ohio Edison's reading satisfies this rule easily. There is nothing redundant about pairing "cut" with "remove" — removal of threatening growth with herbicide is often conducted after hand-cutting, not as an alternative to it. (Quattrocchi Aff., Ex. A, at 3.)

In any event, in the context of a formal and sometimes repetitive document, the surplusage canon is not a silver bullet. Where reasonable readings justify the use of extra language, "[u]ltimately, it is better to put theories of surplusage to the side and to simply look to the text of the contract." *Beverage Holdings, L.L.C. v. 5701 Lombardo, L.L.C.*, 159 Ohio St. 3d 194, 2019-Ohio-4716, 150 N.E.3d 28, ¶ 19. Given that there is a comprehensible reason for every word in the sentence, and all of them confer utility rights, that analysis leads to only one sensible reading.

2. Supposed Oddities in the Text Make Perfect Sense in Context

The Easement text is built around lists. At a higher level, the operative sentence contains three instances, rather than one, of the word "right": one for line maintenance, one for access to enable line maintenance, and one for addressing threats to line maintenance. These rights are cumulative, not at odds with each other. The correct reading harmonizes with the purpose of the sentence – in broad strokes, with sweeping verbs, to allow the utility to protect its lines using a variety of options. This reading method, indeed, is required under *Buckeye Pipe Line*. The Corders dislike the ramifications of the approach, but each of their objections fails given the configuration of the parties and the document. *See Buckeye Pipe Line*, 53 Ohio St. 2d at 241, 374 N.E.2d 146 (including ordinary definitions is mandatory unless "manifest absurdity" results).

a. It Is Not Strange that the Method of Removal Is Left to the Utility

Appellees' interpretation requires the Court to import a restriction into the word *remove* that it simply does not contain. Urging the Court to recognize that context matters, Appellees proposes a hypothetical in which a judge orders: "Bailiff, remove attorney Smith!" (Opp. at 11.) In that context, Appellees say, surely not all methods for such *removal* will be allowed.

This example cuts the wrong way. Since the judge is not purporting to *remove* the attorney by words alone (i.e., sending him away), he or she is invoking the special authority and expertise of the bailiff, who specializes in physical *removal* as a key part of his or her professional training. In some cases, the bailiff will "remove" the attorney by raising an eyebrow; sometimes, the bailiff will use a hand on the attorney's shoulder; sometimes he or she will remonstrate with Smith verbally; and sometimes, indeed, if the attorney is presenting a threat to the safety of the public, the bailiff will use handcuffs, tasers, or volatile pepper spray, creating risks that are justified in light of the larger risks at hand. (*Cf.* Opp. at 11 (rightly acknowledging that, in most scenarios, the bailiff will not be trained to "spray[] the attorney with chemicals").) None of these is ruled out by the word *remove*. Which method is appropriate is left to the special expertise of the bailiff, who is trained in bringing about a certain state of affairs in a courtroom.

In Appellees' example, importantly, the judge has not undertaken to tell the bailiff *how* to do his or her job. The legal order employs a broad term, and the law endows the professional to carry it out using discretion and expertise. Thus, although it is true that "not every dictionary definition applies in every context" (Opp. at 11), the use of a general term, without qualification, creates broad authority. As the professionalism of the bailiff exemplifies, such authority is constrained by other regimes and norms, not by secret implications of a single word. The word itself, standing alone, should be read broadly to allow for all possible situations. This is the holding of *Buckeye Pipe Line*, the one that Appellees seek to overturn.

b. It Is Not Strange that Obstruction Management Receives Special Mention

According to the Corders, the special clause relating to vegetation and obstructions is not an expansion of the utility's general maintenance right: it is present in the text in order to "*limit* Ohio Edison's methods of dealing with obstructions to trimming them, cutting them, and carrying them away." (Opp. at 2 (emphasis added).) This claim cuts against every feature of the clause at issue, which expands upon the general right to *maintain*, as follows:

> The easement and rights herein granted shall include [1] 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; [2] the right of ingress and egress upon, over and across said premises for access to and from said right-of-way; and [3] 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…

(Aff. of Bloss, Ex. A (brackets added).) Appellees claim that the "right to … remove" should be read as a limit on the maintenance right, not an expansion of it. But this ignores the actual context — a sentence accumulating rights on top of each other, to ensure various things can all be done independently of each other. And it ignores the urgent safety concerns associated with potential "obstructions" to high-voltage lines in a remote space.

Under the three rights demarcated above, the easement can do three types of things. It can erect and tend to its lines within the right-of-way. It can cross other parts of the land to reach the right-of-way. And relying solely on its own judgment, it can remove any obstruction threatening the lines. Thus in the interest of public safety, the utility has expansive power to conduct operations. A tall tree in danger of falling, or a short one ready to grow, may be trimmed, cut, or removed. A pool and storage shed that come within arcing distance of the lines can be removed outright, even if they do not block the right-of-way. *See Ohio Edison Co. v. Wilkes*, 7th Dist.

Mahoning No. 10 MA 174, 2012-Ohio-2718, ¶ 72 (under the *Buckeye Pipe Line* principle, rejecting hypertechnical reading of the word "obstruct" by which landowner tried to pick and choose among dictionary definitions). The purpose of an easement like this is to confer on the utility, expansively, any and all of the rights it needs to promote the safety of the public and the reliability of the grid. *Accord* R.C. 4905.22. Appellees' reading would frustrate the purpose of the clause, and of the document as a whole.

c. It Is Not Strange that the Text Allows for Unforeseen and Unspecified Methods

The Corders argue that the word *remove* must be read to conform with the "intentions of the original parties to the Easements in 1948." (Opp. at 20.) They say "[m]ore modern easements may grant additional rights" (*id.* at 2), but the exercise of *this* one is confined to the scope of the drafters' imaginations. Although Appellees say they are not opposed to technology, the effect of this approach would be to encourage rulings like the one reached by the Seventh District — requiring evidence that the parties foresaw the method at issue, no matter when that method was invented. Narrow readings of ancient words inevitably create a "dead hand" effect, as the limited imagination of the past is imposed to constrain the options available in the present. Thus, even though all the dictionaries said otherwise at the time, the Corders say the Easement drafters could not possibly have allowed for any meaning for *remove* besides "to change the location of." (Opp. at 19.) Such a restrictive effect on an ordinary word is especially misplaced for easements like this one, in which authority has been given to access the land in order to promote the public interest and safety "forever." (Bloss Aff., Ex. A.)

Courts are instructed, under an array of doctrines, to give broad interpretations to formal documents that deploy broad language to address the long term. Where the parties did not spell out restrictions, they are assumed to have intended flexibility for the future. *E.g.*, *Buckeye Pipe*

Line, 53 Ohio St. 2d at 247, 374 N.E.2d 146 (since "there is no language contained in the 1947 agreement which specifies or limits which [oil and gas] products or substances may be transported, it follows that appellee is not limited in the kinds of products it may transport"). As explained in depth by *amici*, a well-established doctrine of this kind applies squarely to such cases, and it long predates the leading 1978 authority *Buckeye Pipe Line*. *See Potter v. Burton*, 15 Ohio 196, 199 (1846) ("every [property interest] grant shall be construed, in a case of doubt, most strongly against the grantor"). A party giving a permanent right in connection with land is expected to spell out restrictions in writing, not to hope they might be created by implication after he or she is gone.

This case exemplifies why a "dead hand" instrument should not be used to limit the opportunities available for society to improve. The parties to the Easements included the catch-all term "remove" because they wanted vegetation to be managed safely and appropriately. Although they did not know how, they knew that in the distant future, science and technology would advance to continue enhancing safety, reliability, and the public interest. By design, their use of the broad term *remove* leaves ample room for the state-of-the-art targeted herbicides at issue here. This technology encourages the growth of compatible plants, removing only those that threaten the lines, and it is environmentally sounder than the clear-cutting that the Corders celebrate in their citation of *Beaumont* (Opp. 16-17). It is uncontroverted, here in 2023, that "utilizing only mechanical, or hand cutting for this site rather than herbicides would actually incur far more ecological negative impact than the … approach using herbicides." (Quattrocchi Aff. at 7.) Nothing in the law, the text, or the record supports the Corders' position.

III. CONCLUSION

The ruling of the Seventh District Court of Appeals should therefore be reversed, and judgment should be granted in favor of Appellant on its Cross-Motion for Summary Judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of September, 2023, a true and correct copy of the foregoing was served via regular mail and 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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