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CASE NO. 2023-1182

IN THE SUPREME COURT OF OHIO

APPEAL FROM THE
COURT OF APPEALS FOR CUYAHOGA COUNTY
EIGHTH APPELLATE DISTRICT
CASE NO. 112202

STATE OF OHIO,
Plaintiff-Appellant
Vs
ALONZO KYLES,
Defendant-Appellee

BRIEF OF *AMICUS CURIAE*, ALLEY CAT ALLIES

IN SUPPORT OF THE POSITION OF PLAINTIFF-APPELLANT STATE OF OHIO

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SUMMARY OF THE ARGUMENT

Defendant Alonzo Kyles was convicted of companion animal cruelty, a felony of the fifth degree, for knowingly causing serious physical harm to a cat. Defendant's conviction was reversed by the Eighth District Court of Appeals, which held that not all cats and dogs meet the definition of being a "companion animal." Specifically, that a cat or dog is not a companion animal unless the State proves that the cat or dog was provided care by a person.

The decision by the appellate court is inconsistent with the plain language and intention of the current statutory scheme. The decision adds a new element to the plain language of the offense that leads to an absurd and vague result. Interpreting the statute in this manner would result in the nonsensical exclusion of virtually every feral or community cat or dog, and every stray cat or dog that even momentarily escapes their home where their owner is not known or ultimately discovered. Regardless of this interpretation, the appellate court also misapplied the meaning of the word "kept." The State presented sufficient evidence to prove that the cat was "kept" even if no caregiver of the cat was identified. The cat was confined in an apartment building, leading to the most reasonable interpretation that the cat lived in that building, and was immobilized by Defendant in a pool of bleach.

STATEMENT OF THE FACTS

After a bench trial, Defendant Alonzo Kyles was convicted of "Prohibitions Concerning Companion Animals," more commonly referred to as Companion Animal Cruelty, in violation of R.C. 959.131(C), a felony of the fifth degree. The facts as set forth in the appellate decision in *State v. Kyles*, 8th Dist. Cuyahoga No. 112202, 2023-Ohio-

2691 indicate that Defendant poured a large amount of bleach on the floor in the basement of an apartment building for the purpose of driving cats away. A cat was found lying still in the basement, completely soaked in the bleach, and suffering from chemical exposure. The cat had no collar or any identifiable markings and remained unclaimed by anyone present. *Id.*

The Eighth District Court of Appeals reversed the conviction, finding that there was insufficient evidence to prove that the cat was a "companion animal" as defined by R.C. 959.131(A)(1). The decision holds, for the first time in Ohio, that not all cats or dogs are companion animals unless the State proves that cat or dog is "cared for or under physical control" of a person. *Id.*, ¶ 17.

<u>STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*</u>

The undersigned, Alley Cat Allies, submits this brief as *Amicus Curiae* in support of the Appellant, State of Ohio. Alley Cat Allies was first established in 1990 and is the leader of the global movement to protect and improve the lives of cats and kittens. The organization works with lawmakers, shelters, and the public toward humane, nonlethal, effective laws and policies that serve the best interests of cats and the communities in which they live.

Alley Cat Allies has a particular interest in this case as an organization that advocates for the protection and humane treatment of cats and kittens worldwide. Alley Cat Allies is also a pioneer of Trap-Neuter-Return (TNR) for community cats—unowned cats who live outdoors. Through TNR, cats are humanely trapped, spayed or neutered, vaccinated, eartipped to prove they have been part of a TNR program, and returned to their outdoor homes, where they thrive. Community cats are not owned and it is not

uncommon for one community cat to have multiple known or unknown caregivers in the community. These cats are members of the community who deserve to live in peace without being subjected to acts of cruelty.

TNR is the only humane and effective approach to community cat populations. Its effectiveness is demonstrated by the thousands of communities conducting successful TNR programs right now, and the hundreds more that have adopted official TNR ordinances and policies.

ARGUMENT

Proposition of Law No. 1:

R.C. 959.131(A)(1) provides that all dogs and all cats are "companion animals" and that status does not change based upon whether they are "kept" by a person.

A. Statutory construction and interpretation.

"In our system of government, valid legislative enactments, even seemingly flawed or incomplete ones, may not be amended by judicial ukase (edict)." *Fairborn v. DeDomenico*, 114 Ohio App. 3d 590, 591 (1996). If a provision is not ambiguous, construction is not needed and legislative intent is not at issue. "One of the cardinal rules of statutory construction is that we must first examine the language of the statute itself. *Provident Bank v. Wood*, 36 Ohio St.2d 101, 105, 304 N.E.2d 378 (1973). "'[I]f the words [are] free from ambiguity and doubt, and express plainly, clearly, and distinctly the sense of the lawmaking body, there is no occasion to resort to other means of interpretation.'" *Jacobson v. Kaforey*, 149 Ohio St.3d 398, 2016-Ohio-8434, 75 N.E.3d 203, ¶ 18, quoting *Risner v. Ohio Dept. of Natural Resources, Ohio Div. of Wildlife*, 144 Ohio St.3d 278, 2015-Ohio-3731, 42 N.E.3d 718, ¶ 12; *Slingluff v. Weaver*, 66 Ohio St. 621, 64 N.E. 574 (1902), paragraph two of the syllabus.

"When a statute is reasonably susceptible of more than one meaning, however, it is ambiguous and requires judicial interpretation." *Jacobson v. Kaforey*, 149 Ohio St.3d 398, 2016-Ohio-8434, 75 N.E.3d 203, ¶ 82, citing *Bailey v. Republic Engineered Steels, Inc.*, 91 Ohio St.3d 38, 40, 2001-Ohio-236, 741 N.E.2d 121 (2001).

It is well settled that, "the only mode in which the will of a legislature is spoken is the statute itself. Hence, in the construction of statutes, it is the legislative intent manifested in the statute that is of importance, and such intent must be determined primarily from the language of the statute, which affords the best means of the exposition of the intent…the general rule is that no intent may be imputed to the Legislature in the enactment of a law, other than such as is supported by the language of the law itself. The courts may not speculate, apart from the words, as to the probable intent of the Legislature." *Wachendorf v. Shaver*, 149 Ohio St. 231, 78 N.E.2d 370 (1948). The *Wachendorf* Court went on to hold that "courts, in the interpretation of a statute, may not take, strike or read anything out of a statute, or delete, subtract or omit anything therefrom… if the act or acts in question are couched in plain and unambiguous language, courts are not justified in adding words to such statutes, neither may the courts delete words from a statute, but must construe intent of the lawmakers as expressed in the law itself."

These rules of statutory interpretation have remained consistent for decades with the Court repeatedly holding that "the primary goal of statutory interpretation" is "to ascertain and give effect to the legislative intent in enacting the statute." *Featzka v. Millcraft Paper Co.*, 62 Ohio St.2d 245, 247, 16 O.O.3d 280, 282, 405 N.E.2d 264, 266 (1980). And that "the intent of the General Assembly must be determined primarily from

the language of the statute itself." *Stewart v. Vivian*, 151 Ohio St. 3d 574, 2017-Ohio-7526, 91 N.E.3d 716, ¶ 24. In *Cline v. Ohio BMV*, 61 Ohio St. 3d 93, 97, 573 N.E.2d 77 (1991), citing *State ex rel. General Elec. Supply Co. v. Jordano Elec. Co.*, 53 Ohio St. 3d 66, 71, 558 N.E.2d 1173 (1990), the Court held that when determining legislative intent, "it is the duty of the court to give effect to the words used, not to delete words used or insert words not used." "Significance and effect should if possible be accorded every word, phrase, sentence and part of an act." *Id.* citing *Wachendorf,* supra. "The General Assembly must be 'presumed to know the meaning of words, to have used the words of a statute advisedly and to have expressed legislative intent by the use of the words found in the statute.'" *In re Application of 6011 Greenwich Windpark, L.L.C.*, 157 Ohio St. 3d 235, 2019-Ohio-2406, 134 N.E.3d 1157, ¶ 30, citing *Wachendorf*, at 237. "To discern legislative intent, a court first considers the statutory language, 'reading words and phrases in context and construing them in accordance with rules of grammar and common usage.'" *State ex rel. Autozone Stores, Inc. v. Indus. Comm. of Ohio*, 2023-Ohio-633, 209 N.E.3d 933 ¶ 61 (10th Dist.), quoting *State ex rel. Choices for South-Western City Sch. v. Anthony*, 108 Ohio St.3d 1, 2005-Ohio-5362, ¶ 40, 840 N.E.2d 582.

B. Legislative history of Revised Code Section 959.131.

In 2003, the Ohio legislature enacted Senate Bill 221, creating R.C. 959.131, known as the "companion animal cruelty" law. This was the first major change to Ohio's animal cruelty law in over 120 years. The only animal cruelty statute in Ohio until that enactment was R.C. 959.13. R.C. 959.13 applies to all animals generally and remains unchanged since its last amendment in 1977. R.C. 959.13 has not been substantively changed since its earliest enactment in the late 1800s.

Both R.C. 959.13 and R.C. 959.131 use the basic definition of "cruelty," "torment" and "torture," which is "every act, omission, or neglect by which unnecessary or unjustifiable pain or suffering is caused, permitted, or allowed to continue, when there is a reasonable remedy or relief." R.C. 1717.01(B). The difference between the two statutes is that R.C. 959.131 applies only to "companion animals," and provides a range of offenses and penalties depending on the severity of the conduct and the *mens rea* of the offender. Penalties for violation of R.C. 959.131 range from a second degree misdemeanor to a fifth degree felony, while penalties for a violation of R.C. 959.13 are limited to a second degree misdemeanor. R.C. 959.99.

The legislative purpose of R.C. 959.131 was to acknowledge that all cats and dogs regardless of where they live, as well as other kinds of animals who live in a residential dwelling, currently hold a "greater" value to society as our companions and thus, deserve greater protections.

C. The plain language of the statute is not ambiguous and provides that all cats and dogs are companion animals.

The plain language of R.C. 959.131(A)(1) is as follows:

> "'Companion animal' means any animal that is kept inside a residential dwelling and any cat or dog regardless of where it is kept, including a pet store as defined in section 956.01 of the Revised Code. 'Companion animal' does not include livestock or any wild animal."

Two sets of animals qualify as "companion animals": (1) animals kept in a residential dwelling; and (2) cats and dogs. There is no suggestion that cats and dogs are either "livestock" or "wild animals," thus, the portion of the definition which directly relates to this case involving a cat is as follows: "'Companion animal' means … any cat or dog regardless of where it is kept." *Id.*

Under the normal rules of grammar, the nouns "cat or dog" are modified by the prepositional phrase "regardless of where it is kept." The word "regardless" is commonly understood to mean "whether or not," "irrelevant to" or "without regard to." The phrase "regardless of" has been defined by Mirriam-Webster as "without taking into account."[1] A plain reading of the statute is that a companion animal is any cat or dog ***without regard*** to its "keeping." A plain reading tells us that all cats and dogs are companion animals. The reader is required to disregard whether or not the cat or dog is "kept." The statute is unambiguous in this respect.

If we must resort to other means of interpretation, the appellate court failed to consider the plain language of the remainder of R.C. 959.31 while doing so. Defendant was convicted of a violation of R.C. 959.131(C), which states that "[n]o person shall knowingly cause serious physical harm to a companion animal." Serious physical harm is further defined by R.C. 959.131(A)(12). Notably, there is no requirement for this subsection that companion animal be confined, restrained or "kept."

R.C. 959.131(D), which creates a series of misdemeanor offenses for companion animal neglect applies only to a person who "confines or who is the custodian or caretaker" of a companion animal. Under this subsection, it is necessary to require proof that the offender confined or was the custodian or caretaker[2] of the animal as an additional element of the offense. R.C. 959.131 (E), (F), and (G) also specifically require proof that an animal is confined, or that the offender is a custodian or caretaker–in other words, that the animal is "kept." A person who "confines or is the custodian or caretaker"

[1] https://www.merriam-webster.com/dictionary/regardless%20of, last accessed February 27, 2024.

[2] The word "caretaker" is used statutorily in R.C. 959.131(D), however A*micus Curiae* Alley Cat Allies believes that the word "caregiver" is the more appropriate term for a person who provides care to an animal.

is clearly a "keeper" under the definition adopted by *Kyles*: "[a]n animal is "kept" when there is evidence that it is cared for or under physical control." *State v. Kyles*, *supra*, ¶ 17. This requirement does not exist in the plain language of R.C. 959.131(C) or (B), which both have the *mens* rea of "knowingly."

The plain language of R.C. 959.131 as a whole provides that there are differences in the degree of control a person must exert over a subject animal in order to qualify for a particular offense. "[W]hen the legislature uses particular language in one part of a statute but omits that language in another part of the statute or uses different language, it is presumed that the legislature did so intentionally and purposely. *Diller v. Diller*, 2021-Ohio-4252, 182 N.E.3d 370, ¶ 42 (3d Dist.), citing *Hulsmeyer v. Hospice of Southwest Ohio, Inc.*, 142 Ohio St.3d 236, 2014-Ohio-5511, ¶ 26, 29 N.E.3d 903; *NACCO Industries, Inc. v. Tracy*, 79 Ohio St.3d 314, 316, 1997- Ohio 368, 681 N.E.2d 900 (1997). If the appellate court is correct in its assertion that "being kept" is an element of every offense under R.C. 959.131, then the differences between the various sections in R.C. 959.131 are meaningless, contradictory, or both.

D. The appellate court's interpretation of the statute adopts an absurd result.

The appellate court's interpretation is inconsistent with the unambiguity of the plain language of the statute and instead adopts an absurd result, contrary to the intention of the legislature. The plain meaning canon of statutory interpretation directs that statutes should be interpreted according to the ordinary meaning of their words. The absurdity doctrine was first adopted in 1868. In *United States v. Kirby*, 74 U.S. 482 (1868), the Supreme Court dismissed an indictment charging members of the local sheriff's office with violating a statute that prohibited anyone from "knowingly and willfully obstruct[ing]

or retard[ing] the passage of the mail, or of any driver or carrier." The defendants had arrested a mail carrier who was wanted for murder while that mail carrier was delivering mail. Although the defendants had violated the clear terms of the statute, the Court dismissed the indictment. In doing so, the Court adopted the absurdity doctrine, explaining:

> All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter. *Id.*

In support of its decision to reject the clear text, the Court referenced two early decisions from Europe, both of which had rejected the ordinary meaning of a statute. First, a medieval Italian court had refused to punish a surgeon "who opened the vein of a person that fell down in the street in a fit" for violating a law punishing anyone "who drew blood in the streets." *Id.* Second, an English court had refused to punish a prisoner who had escaped from a prison that was on fire under a statute prohibiting prison escapes. In these two cases, the courts deviated from the ordinary meaning of the statutes because application of the statute to the particular facts of each case led to a result not intended by the legislature. "[T]he absurdity doctrine therefore rests on the premise that if legislators had foreseen the problems raised by a specific statutory application, 'they could and would have revised the legislation to avoid such absurd results.'" Glen Staszewski, *Avoiding Absurdity*, 81 IND. L.J. 1001, 1027-28 (2006). Relying on the rationale in these prior cases, the Supreme Court in *Kirby* rejected the clear statutory text and adopted the absurdity doctrine. In all three cases, the courts' decisions to reject the clear text led to a result that seems just and fair.

In *Holy Trinity Church v. United States*, 143 U.S. 457 (1892), the Supreme Court suggested that a meaning that conflicted with congressional intent would be absurd. *Id.* at 459-61. Typically, the Court equates absurd with "odd" and "in conflict with Congressional intent." See, e.g., *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 509 (1989) (identifying the result as "odd"). In *Robbins v. Chronister*, 402 F.3d 1047, 1050 (10th Cir. 2005), rev'd en banc, 435 F.3d 1238 (10th Cir. 2006), the majority adopted *Holy Trinity Church*'s broad definition of absurdity, contrary to congressional intent, while the dissent adopted a much narrower definition—"lead[ing] to results so gross as to shock the general moral or common sense." *Id.* at 1055.

When the ordinary meaning of a statute would lead to absurd results, courts will seek an alternative reading of the statutory text pursuant to the absurdity doctrine. In this case, the appellate court has created an absurd result by misinterpreting unambiguous statutory language and intent.

The *Kyles* decision absurdly undermines the legislative intent of SB 221 by creating separate classes of cats and dogs. The intention of SB 221 is clear—to acknowledge that society currently places a higher "value" on all cats and dogs regardless of where they live, and other kinds of animals that reside in residential dwellings. For centuries, dogs, cats, and other domestic animals have enriched the lives of families across the world. Throughout the country, states have enacted legislation to protect companion animals—specifically cats and dogs—because we, as a society, undoubtedly consider these animals to be family. There are felony provisions in all 50 states and the District of Columbia related to the intentional killing of a cat or dog. Moreover, cats and dogs have garnered heightened legal protections due to the known link of

interconnectedness between violence towards animals and violence towards people. *See*, e.g. *Understanding the Link between Animal Cruelty and Family Violence: The Bioecological Systems Model.* Int J Environ Res Public Health. 2020 Apr 30;17(9):3116.

The *Kyles* interpretation leads to an absurd result where only *some* cats and dogs deserve the heightened protections of R.C. 959.131 and offenders are subject to a lesser or greater punishment based on whether the State can prove the cat or dog is cared for and whether the defendant knew the animal was cared for. For example, the cats and dogs who deserve less protection according to *Kyles* are:

1. The stray cat with the 2-foot arrow piercing her back and body in Cleveland.[3]
2. The stray dog who was shot in the head and left for dead in Youngstown.[4]
3. The stray cat who was shot and hung from a fence with a shoelace in Cleveland Heights.[5]
4. The stray dog who was set on fire in East Cleveland.[6]
5. The stray cat who was shot in Conneaut.[7]
6. The community cat who was kicked and brutally beaten with a bat in Toledo.[8]

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[3] Cat shot by arrow on Cleveland's west side, https://www.news5cleveland.com/news/local-news/cleveland-metro/cat-shot-by-arrow-on-clevelands-west-side-animal-protective-league-searching-for-shooter, last accessed February 26, 2024.

[4] Homeless dog who was shot in head and left to die is beating all the odds, https://www.mirror.co.uk/news/us-news/homeless-dog-who-shot-head-28115248, last accessed February 26, 2024.

[5] Cat found shot, hanging on fence in CLE Hts, https://www.news5cleveland.com/news/local-news/oh-cuyahoga/cat-shot-and-hung-on-fence-in-cleveland-heights, last accessed February 26, 2024.

[6] Stray dog put down after being set on fire in East Cleveland, https://www.wkyc.com/article/news/crime/95-b36963dc-94b6-4223-8477-7db0cbac63e3, last accessed February 26, 2024.

[7] ‘Act of cruelty’: Conneaut cat to lose arm after being shot in chest, https://www.cleveland19.com/2022/12/17/act-cruelty-conneaut-cat-lose-arm-after-being-shot-chest/, last accessed February 26, 2024.

[8] Two teens face animal cruelty charges in cat-beating case, https://www.toledoblade.com/local/police-fire/2019/01/14/two-teens-animal-cruelty-cat-beating-toledo-police-department/stories/20190114177, last accessed February 26, 2024.

7. The community cat who was slammed into the ground repeatedly and then set on fire in Cleveland.[9]

None of these animals had identified owners or caregivers. This list of cats and dogs who would not be covered under R.C. 959.131 pursuant to the *Kyles* interpretation, even though they involved depraved and disturbing acts of cruelty the statute seeks to prevent, is clearly not a list of "lesser" animals, nor offenses. The *Kyles* interpretation excludes stray, feral, and community cats and dogs where it cannot be proved that the animal was provided care by a person. It also excludes animals that may have recently escaped from their owner's home, but the connection is never discovered. It is nonsensical to suggest that the legislature intended to treat an indoor cat differently than one who is outdoors or even indoor-outdoors, or that the legislature intended to treat a cat or dog who is running loose from its owner differently than one who is confined. In this case, the appellate court has created an absurd result by misinterpreting unambiguous statutory language and intent.

E. The appellate court's decision creates vagueness that does not otherwise appear in the statute.

The *Kyles* decision holds that the State must prove that an animal is "kept" to qualify as a companion animal and interpreted the word "kept" in a vague manner that is both inconsistent with current case law and would result in injustice to both animals and offenders. Under the current statute, which clearly specifies any dog or cat is a companion animal, a reasonable person has notice of whether their conduct is a violation. The absurd interpretation of the Court of Appeals would likely render the statute vague, leaving a

[9] Cleveland man accused of burning cat pleads not guilty, https://www.wkyc.com/article/news/local/northeast-ohio/cleveland-man-accused-of-burning-cat-pleads-not-guilty/95-315831643, last accessed February 26, 2024.

reasonable person unable to have notice as to whether their conduct was a felony or misdemeanor since a person cannot reasonably know whether a cat or dog is kept simply by looking at them.

Relying on *State v. Hartman*, 9th Dist. Summit No. 26250, 2012-Ohio-4694 and *Buettner v. Beasley*, 8th Dist. Cuyahoga No. 83271, 2004-Ohio-1909, the *Kyles* court held that "[i]n the case of cats and dogs, the state must establish that the cat or dog received care, regardless of the location or provider of the care." *Kyles*, *supra*.

Reliance on these cases is erroneous. *State v. Hartman*, *supra*, did not hold that an animal must be "kept" to qualify as a companion animal. The issue was whether cockatiels, macaws, parrots, parakeets, and cockatoos are "wild animals" because companion animal does not include livestock or any wild animal. *Buettner v. Beasley*, *supra*, is not a criminal case at all, but a civil matter seeking to interpret R.C. 955.28(A), Ohio's strict liability statute for damages caused by dogs. The *Buettner* court does not address the meaning of the word "kept," but does attempt to shed light on the related noun, "keeper." The *Buettner* court's holding is far short of definitive. It acknowledges that there is no definition for the term "keeper," and it establishes no elements to consider. In turn, the *Kyles* court extends the words "kept" or "keeper" into the concept of the caregiver, or a person who provides care. The *Buettner* court does not reach this conclusion and neither has any other Ohio court.

The *Kyles* interpretation raises more questions than it resolves. The result is as absurd as it is vague. "A vague statute or ordinance is infirm because it does not give notice of what is prohibited by the legislation." *Chaplinsky v. New Hampshire*, 315 U.S.

568, 572 (1942). Vague laws violate two fundamental principles of due process: (1) they leave the public guessing as to what actions are proscribed; and (2) they invite arbitrary and discriminatory enforcement by giving unbridled discretion to government officials. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *Connolly v. General Construction Co.*, 269 U.S. 385, 391 (1926). The doctrine is based on the due process provision of the Fourteenth Amendment and bars enforcement of "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *United States v. Lanier*, 520 U.S. 259, 266, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997). See also *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L. Ed.2d 903 (1983) ("[T]he void for vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."). Thus, the adequacy of notice is evaluated from two perspectives: whether a person subject to the law can understand what is prohibited and whether those prohibitions are clear enough to prevent arbitrary enforcement.

In *Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, the Ohio Supreme Court determined that a City of Norwood ordinance allowing the city to take property through eminent domain if the property was in a "deteriorating area" was void for vagueness. The Court noted that "we cannot say that the appellants had fair notice of what conditions constitute a deteriorating area, even in light of the evidence adduced against them at trial." *Id.* at ¶ 97. The Court proclaimed that "deteriorating area" was a

"standardless standard." *Id.* at ¶ 98. Thus, the ordinance simply recited subjective factors "that invite ad hoc and selective enforcement[.]" *Id.*

No different is the standard created by the *Kyles* interpretation of R.C. 959.131(A)(1)—a standardless standard. Subjecting an offender to either a second degree misdemeanor or a fifth degree felony depending on whether the State can identify an owner/caregiver of their animal victim clearly encourages arbitrary enforcement. Moreover, there is no standard by which the State is directed to determine *who* the caregiver is, *what* qualifies as providing care, or *when* that qualifying care would have been provided. Finally, it would require the State to prove the defendant knew the animal was kept, raising the bar far beyond proving whether the animal is a dog or cat, which can be easily determined.

Kyles stands for the proposition that there is a requirement to prove that a companion animal received "care" from a human being at some point in history. If that is the case, do the following animals qualify?

1. A community cat who was trapped-neutered and returned to her original outdoor location three years prior to the criminal act.
2. A dog who was abandoned by her owner/caregiver on the day of the criminal act, but the day prior had an owner/caregiver.
3. A community cat who was provided with an outdoor shelter by a good Samaritan three weeks prior to the criminal act.
4. A stray dog who eats from a garbage can behind a restaurant.
5. A stray cat who drinks from a community water bowl at a dog park.
6. A stray dog who has a microchip, but the microchip is unregistered and the dog does not have an identifiable owner/caregiver.
7. A friendly stray cat who wanders the neighborhood and from time-to-time is welcomed into various neighbors' homes, but none of whom come forward to claim the cat.

8. A stray dog wearing a collar with no identification tag.
9. A cat who escapes from her owner/caregiver, but the owner/caregiver is never conclusively identified because the cat is burned beyond recognition.

In the context of community cats, in particular, the *Kyles* interpretation would essentially exclude every single community cat from the protections of R.C. 959.131. Community cats are unowned cats who live outdoors. Community cats live outdoors in virtually every landscape on every continent where people live. Like indoor cats, they belong to the domestic cat species (Felis catus). However, community cats, also called feral or outdoor cats, are generally not socialized to people and cannot live indoors. They live full, healthy lives with their feline families, called colonies, in their outdoor homes. In a TNR program, community cats are humanely trapped, brought to a veterinarian to be spayed or neutered, vaccinated, and eartipped (the universal sign that a cat has been part of a TNR program), and then returned to their outdoor homes. Community cats may be cared for by one or more residents of the immediate area or other people who is/are known or unknown. It is very possible that the Defendant's victim in this case was a community cat or was a cat who was abandoned by her owner/caregiver prior to the day of the criminal act. In either event, identifying whether this victim was "owned" or "cared for" is irrelevant pursuant to the plain language and intent of the statute.

The requirement of proving that an animal received "care" from a human being at some point in history exists nowhere in the statutory definition for a reason. It is absurd to create two separate classes of cats and dogs based on a vague and unintelligible requirement that "the state must establish that the cat or dog received care, regardless of the location or provider of the care." *Kyles,* supra. This interpretation not only creates injustice to cats and dogs, but to offenders who will be subject to either a second degree

misdemeanor or a fifth degree felony depending on whether the State can identify who the owner/caregiver of their animal victim was.

The appellate court misconstrued the clear and unambiguous definition of "companion animal" by isolating the word "kept," and then going further to require proof that a cat or dog was also provided with care by a person. To hold in favor of Defendant-Appellee would require overruling prior precedent concerning the entire system of legislative intent and statutory interpretation. It would be contrary to public interest to adopt Defendant-Appellee's position, further warranting the decision in *Kyles* to be overturned.

Proposition of Law No. 2:

There is sufficient evidence that an animal is "kept" by a person where the animal is confined in a structure or its movement is otherwise restricted, or where the animal is otherwise immobilized by a person.

A. Standard of review.

When reviewing the sufficiency of the evidence, this Court must review the evidence in a light most favorable to the prosecution to determine whether the evidence before the trial court was sufficient to sustain a conviction. *State v. Jenks*, 61 Ohio St.3d 259, 279 (1991). An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *Id.* at paragraph two of the syllabus.

When weighing evidence, "[c]ircumstantial evidence and direct evidence inherently possess the same probative value and therefore should be subjected to the same standard of proof. When the state relies on circumstantial evidence to prove an essential element of the offense charged, there is no need for such evidence to be irreconcilable with any reasonable theory of innocence in order to support a conviction." *Id.* at paragraph one of the syllabus.

B. There was sufficient evidence to show the victim cat was "kept."

The Eighth District Court of Appeals erred in its decision that a cat or dog must be "kept" in order to qualify as a "companion animal," as argued above. Even if this Court disagrees about the unambiguity of the statutory language, *Kyles* should still be overturned because there was sufficient evidence that the cat was "kept." The *Kyles* court found that there was insufficient evidence to prove that the victim cat was a "companion animal," but the State did in fact prove that that the victim cat was "kept" even if no caregiver of the cat was identified. The cat was confined in a structure, an apartment building, and was immobilized by Defendant in a pool of bleach.

Ohio courts have defined the word "keeper" as being "one having physical charge or care" of an animal. *Rucker v. Taylor*, 5th Dist. No. 92CA-E-12-044, 1993 Ohio App. LEXIS 3497 (July 12, 1993) *citing Garrard v. McComas*, 5 Ohio App.3d 179, 182, 450 N.E.2d 730 (1982). There is near universal agreement on the meaning of the word "keeper" in the context of other statutes pertaining to animals. "An owner is the person to whom a dog belongs, while *a keeper has physical control* over the dog." *Marin v. Frick,* 11th Dist. No. 2003-G-2531, 2004 Ohio 5642, *emphasis added*, quoting *Khamis v. Everson,* 88 Ohio App.3d 220, 226, 623 N.E.2d 683 (1993); *Flint v. Holbrook,* 80 Ohio

App.3d 21, 25, 608 N.E.2d 809 (1992); *Garrard v. McComas*, 5 Ohio App. 3d 179, 40 N.E. 2d 730 (1982).

In *Marin*, the appellant was out walking with a friend who had her parent's dog on a leash. The appellant held the dog's leash *for only a minute and a half* while the friend ran back into the house for a brief errand. Nevertheless, the appellant was determined to be the "keeper" of the dog. "The time period during which control is exercised over the dog is irrelevant." *Marin v. Frick, supra*, quoting *Manda v. Stratton*, 11th Dist. No. 98-T-0018, 1999 Ohio App. LEXIS 2018 (Apr. 30, 1999).

Moreover, a person can be a "keeper" merely by making an effort to control an animal. In *Lewis v. Chovan*, 10th Dist. No. 05AP-1159, 2006 Ohio 3100, a dog groomer was bitten while reaching over a dog's head to grab a "grooming noose" in an attempt to help other employees secure the dog. The groomer was held to be a "keeper" because "she approached [the dog] specifically to help control him and to secure him in the bathtub." *Id.* at 9.

The caselaw is consistent throughout Ohio. A volunteer worker is the "keeper" of a dog when all she does is change the water and bedding in the animal's cage at a kennel owned by a third party. *Khamis v. Everson*, 88 Ohio App. 3d 220; 623 N.E.2d 683 (1993). A person who has dogs owned by a third party in his yard which is surrounded by a privacy fence is a "keeper" of the dogs, and thus may be liable under O.R.C. §955.21 for failure to register the dogs. *State v. Turic, Lochtefeld*, 2nd Dist. No. 21453 and 21454, 2006-Ohio-6664. A live-in girlfriend is a "keeper" of her boyfriend's dog where she has in the past fed, walked and taken it to a veterinarian. *Buettner v. Beasley*, supra. And, in *State v. Amos*, 2014-Ohio-3097, 17 N.E.3d 9, ¶ 20 (5th Dist.), the defendant was deemed to be

the "keeper" of a feral, stray kitten by picking it up only long enough to abandon it at a veterinarian's parking lot.

The evidence in this case was sufficient to support the Defendant's conviction.

CONCLUSION

The decision by the appellate court is inconsistent with the plain language and intention of the current statutory scheme. The decision adds a new element to the plain language of the offense that leads to an absurd and vague result. Regardless of this interpretation, the appellate court also misapplied the meaning of the word "kept." The State did prove that that the cat was "kept" even if no caregiver of the cat was identified. The cat was confined in an apartment building and was immobilized by Defendant in a pool of bleach. For the reasons set forth above, the decision by the Eighth District Court of Appeals should be overturned.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on this date a true and accurate copy of the foregoing Brief was served by email upon: Stephen P. Hardwick: stephen.hardwick@opd.ohio.gov, Counsel for Defendant-Appellee and Tasha L. Forchione: tforchione@prosecutor.cuyahogacounty.us, Counsel for Plaintiff-Appellant.

2/27/24

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