NO. 2023-1182

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 112202

STATE OF OHIO
Plaintiff-Appellant

-vs-

ALONZO KYLES
Defendant-Appellee

REPLY BRIEF OF APPELLANT

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R.C. §959.131(C) states that no person shall knowingly cause serious physical harm to a companion animal. For purposes of this felony offense, a companion animal includes any and all dogs or cats. The State need not prove that the dog or cat was cared for or was under somebody's physical control.

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In R.C. §959.131(A)(1) and R.C. §959.131(C), the General Assembly determined that a person who is convicted of causing serious physical harm to "any dog or cat" must be punished at the felony level. Kyles asserts that only "kept" dogs and cats are protected by the law meaning there are "greater penalties for abusing household pets than stray animals[.]" (Br. 1, 2). This position is not supported by the text or any of the R.C. §1.49 factors for determining legislative intent. The plain text of R.C. §959.131(A)(1) protects "any dog or cat". Nothing in the statute requires the State to establish that the dog or cat received care or was under physical control as held by the Eighth District. This Court should correct that misreading and reverse.

A. There is no basis in the text for limiting the phrase "any dog or cat" to "kept" dogs and cats.

R.C. §959.131(A)(1) states,

> "Companion animal" means any animal that is kept inside a residential dwelling and any dog or cat 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.

This case turns on whether unowned outdoor dogs and cats qualify as "any dog or cat" within the meaning of R.C. §959.131(A)(1). Kyles asserts only "kept" dogs and cats fit the definition. (Br. 1, 11). This argument is inconsistent with the language of the statute. The text plainly protects "any" dog or cat.

"Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) (quoting Webster's Third New International Dictionary 97 (1976)). *See also Department of Housing and Urban Development* v. *Rucker*, 535 U.S. 125, 130-131 (2002) (statute making "any" drug-related criminal activity cause for termination of public housing lease precludes requirement that tenant know of the activity); *Brogan* v. *United States*, 522 U.S. 398, 400-401 (1998) (statute

criminalizing "any" false statement within the jurisdiction of a federal agency allows no exception for the mere denial of wrongdoing); *United States* v. *Alvarez-Sanchez,* 511 U.S. 350, 356 (1994) (statute referring to "any" law enforcement officer includes all law enforcement officers--federal, state, or local--capable of arresting for a federal crime); *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 219-221 (2008) (“any other law enforcement officer"); *Small v. United States*, 544 U.S. 385, 397 (2005) (Thomas, J. dissenting) (“‘any court’ unambiguously includes all judicial bodies with jurisdiction to impose the requisite conviction”); *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578(1980)(no uncertainty in the meaning of the phrase, “any other final action”).

This Court has defined “any” as meaning "every" and "all." *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, 889 N.E.2d 995, ¶ 33. In this context, “every” is “used to indicate one selected without restriction.” *See* “any.” *Merriam-Webster.com, 2024*. https://www.merriam-webster.com/dictionary/any. May 6, 2024. “All” is “used to indicate a maximum or whole.” *Id*.

The General Assembly’s use of the term “any” to modify dog or cat is reasonably read to mean a dog and cat of every kind. The word "any" and the absence of restrictive language leaves "no basis in the text for limiting" the phrase "any dog or cat" to “kept” dogs or cats. 520 U.S. at 5.

Kyles infers an exception that does not exist in the text. His interpretation requires the Court to delete the word “any” and add limiting language to the statute. Such limiting language might look like the following:

- Companion animal means * * * a dog or cat that receives care or is under someone’s physical control; or
- Companion animal *only* includes a dog or cat that receives care or is under someone’s physical control; or

- Companion animal does *not* include dog or cat this is feral, stray, unowned or uncared for; or
- This section does not apply to a dog or cat this is feral, stray, unowned or uncared for. *See* R.C. §959.131(H).

The General Assembly could have added a prerequisite for protection by using any variation of limiting language, but it did not. In the absence of such limiting language, the State is not required to prove the dog or cat "received care." *State v. Kyles*, 8th Dist. Cuyahoga No. 112202, 2023-Ohio-2691, ¶ 17.

In determining which interpretation is textually permissible, this Court "may not, in the guise of statutory construction, add limiting language to a statute when the General Assembly did not enact that limitation[.]" *In re Application of Black Fork Wind Energy, L.L.C.*, 156 Ohio St. 3d 181, 2018-Ohio-5206, 124 N.E.3d 787, ¶ 41. "What a text does not provide is unprovided[.]" Scalia and Garner at p. 96.

B. Kyles reads the definition out of context.

Kyles insists that his reading is the "fair reading" of the statute. (Br. 11). The "fair reading" methods seeks to determine "how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 176, 33 (2012). A "fair reading" considers the purpose of the text, "gathered only from the text itself, consistently with the other aspects of its context." *Id.* "*[C]ontext* embraces not just textual purpose but also (1) a word's historical associations acquired from recurrent patterns of past usage, and (2) a word's immediate syntactic setting—that is, the words that surround it in a specific utterance." In other words, context explains what the text

means. Scalia at p. 56; *State v. Reed*, 162 Ohio St. 3d 554, 2020-Ohio-4255, 166 N.E.3d 1106, ¶ 17.

Kyles reads the definition out of context by looking at the phrase, "regardless of where it is kept" in a vacuum. The result is a hyperliteral reading that is "inconsistent with the textually manifest purpose" of the statute. Scalia and Garner at p. 40. The Court "should not pick out one sentence and disassociate it from the context." *Black-Clawson Co. v. Evatt*, 139 Ohio St. 100, 104, 38 N.E.2d 403 (1941). What comes before and after that phrase is very important. Given the context here, a reasonable reader understands that a companion animal includes any dog or cat. The dog or cat does not need to be inside a residential dwelling. It can be in a pet store, or it can be anywhere. The definition covers every possible place a dog or cat will be.

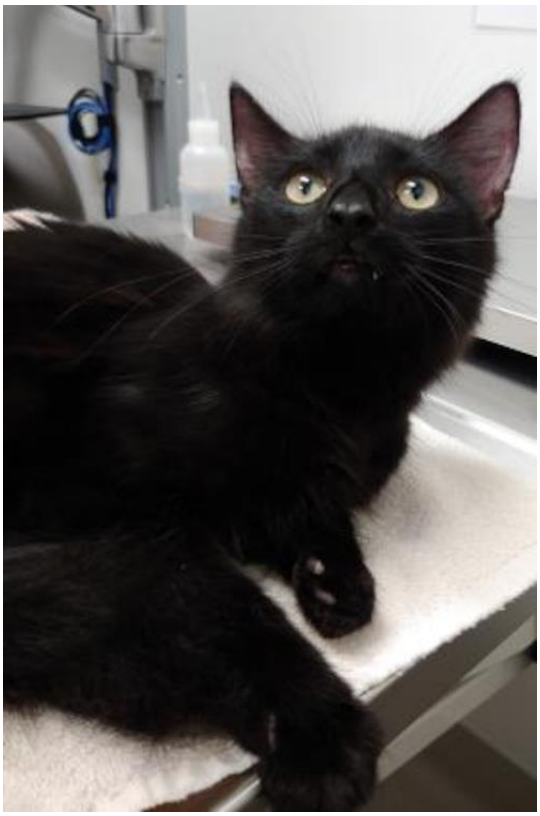
C. Dogs and cats are domestic companion animals, not wild animals.

The last sentence of the definition also provides meaningful context. Companion animal means any dog or cat regardless of where it is kept. R.C. §959.131(A)(1). Companion animal does not include livestock or any wild animal. Id. Therefore, we know that the General Assembly has clarified that a dog or cat is not livestock or a wild animal. Yet Kyles wants the Court to delineate between "dogs and cats that people keep" (Br. 15) and those that exist in the wild. Dogs and cats are domestic companion animals, not wild animals.

Feral, stray, and indoor pet cats are all members of the same species. They are domestic animals, not wild animals. A pet cat is socialized to people whereas a stray cat was socialized at some point "but has left or lost her home, or was abandoned, and no longer has regular human contact." [1] With increased socialization, a stray cat can become a pet again. Id. Likewise, a stray

[1]Feral and Stray Cats: An Important Difference. Alley Cat Allies. Accessed May 7, 2024 at:

cat can become feral with less and less socialization. Id. "A feral cat is an unsocialized outdoor cat who has either never had any physical contact with humans, or human contact has diminished over enough time that she is no longer accustomed to it." Id. Chapter 959 makes no distinction between feral, stray, and indoor pet cats nor are any of these types of cats considered wild animals. Indeed, the kitten at issue here was not wild or feral. Tr. 86–87.



State's Ex. 5.

D. There is no delineation between stray and pet dogs and cats in the overall statutory scheme.

Noticeably missing from Kyles' interpretation is any reference to the overall statutory scheme. R.C. §959.131(A)(1) cannot be read in isolation. "The text must be construed as a whole."

https://www.alleycat.org/resources/feral-and-stray-cats-an-important-difference/#:~:text=Stray%3A%20Might%20walk%20and%20move,Unlikely%20to%20make%20eye%20contact.

Scalia and Garner at p. 167. This is because "context is the primary determinant of meaning." Id. Kyles insists that "[s]tray dogs and cats are protected by R.C. 959.13, not R.C. 959.131" (Br. 1, 9, 19, 22) but that conclusion is not supported by R.C. §959.13 or any other Ohio laws addressing wild animals and domestic animals.

First, the Court can look to whether the term "strays" is used anywhere else. Title 9 of the Revised Code governs agriculture, animals, and fences. Chapter 951 (titled "Animals Running at Large; Strays") differentiates "strays" from "domestic animals" which are situated within Chapter 959. R.C. §951.11 describes how the public may lawfully interact with an animal running at large, termed "strays." R.C. §951.02 describes strays as "horses, mules, cattle, bison, sheep, goats, swine, llamas, alpacas, or poultry[.]" Separately, Chapter 959 encompasses "Offenses Relating to Domestic Animals."

Next, the Court can look to R.C. §959.13 to determine if the statute does, in fact, delineate between stray dogs and cats. It does not. If there was different treatment for pets, strays, or feral cats, one would expect those terms to be included in R.C. §959.13 or elsewhere in the statute. The Maine laws cited by Kyles do reference "stray dogs and cats" and separately define "feral cats."

Since there are no references to stray dogs or cats in R.C. §959.13, the Court can look to R.C. §959.131. Here, the General Assembly has made clear that certain types of domestic animals require additional protection: companion animals. R.C. §959.131(A)(1). The definition of companion animal must be read in conjunction with the other provisions in R.C. §959.131. Again, there are no references to stray dogs or cats in R.C. §959.131. However, within R.C. §959.131, the General Assembly clearly identifies when the section applies to confined and/or cared for domestic animals, as shown (and emphasized) below.

- R.C. §959.131(D) and (E): "No person who *confines or who is the custodian or caretaker* of a companion animal shall * * * [.]"
- R.C. §959.131(F) and (G): "No owner, manager, or employee of a dog kennel who *confines or is the custodian or caretaker of* a companion animal shall * * * [.]"

Similarly, the General Assembly knows how to delineate between owned and unowned and confined and unconfined domestic animals and has done so within other statutes in Chapter 959, as emphasized below.

- R.C. §959.01: "No *owner or keeper* of a dog, cat, or other domestic animal, shall abandon such animal."
- R.C. §959.02: "No person shall maliciously, or willfully, and without the *consent of the owner*, kill or injure a horse, mare, foal, filly, jack, mule, sheep, goat, cow, steer, bull, heifer, ass, ox, swine, dog, cat, or other domestic animal that is the property of another[.]"
- R.C. §959.03: "No person shall maliciously, or willfully and without the *consent of the owner*, administer poison, except a licensed veterinarian acting in such capacity, to a horse, mare, foal, filly, jack, mule, sheep, goat, cow, steer, bull, heifer, ass, ox, swine, dog, cat, poultry, or any other domestic animal that is the property of another; and no person shall, willfully and without *consent of the owner*, place any poisoned food where it may be easily found and eaten by any of such animals, either upon his own lands or the lands of another."
- R.C. §959.04: discussing collection of payment for damages, which presumes an owner;
- R.C. §959.09: stating mandatory reporter must include "address and telephone number of the *owner or other person responsible for care* of the companion animal, if known;"

- R.C. §959.12: “No person shall maliciously alter or deface an artificial earmark or brand upon a horse, mare, foal, filly, jack, mule, sheep, goat, cow, steer, bull, heifer, ass, ox, swine, that is the *property of another*.”
- R.C. §959.13(A)(2): “Division (A)(2) of this section does not apply to animals *impounded or confined* prior to slaughter.”
- R.C. §959.13(A)(4): “No personal shall: * * * *Keep* animals other than cattle, poultry or fowl, swine, sheep, or goats in an enclosure without wholesome exercise and change of air, nor or feed cows on food that produces impure or unwholesome milk;”
- R.C. §959.13(A)(5): “*Detain* livestock * * *.”
- R.C. §959.13(B): Upon the written request of the *owner or person in custody* of any particular shipment of livestock, * * * [.]”
- R.C. §959.14: “No *owner or person having the custody, control, or possession of* * * *[.]”
- R.C. §959.18: “No person who is *not the owner* thereof, shall shoot, kill, or maim an Antwerp or homing pigeon, commonly known as "carrier" pigeon, nor shall such person entrap, catch, or detain a carrier pigeon, provided it has the *name of the owner* stamped upon its wing or tail, or has a band with the *owner's name*, initial, or number on its leg.”
- R.C. §959.29: “No *owner* of a stallion or jack or the agent of such *owner* * * * [.]”

Within the overall statutory scheme, there is no delineation between stray companion animals or, even more generally, domestic animals. Whether an animal is actively possessed or owned does not affect an animal’s legal categorization.

E. Kyles’ interpretation hinders the manifest purpose of the text, enabling offenders to cause serious physical harm to dogs and cats.

Kyles repeatedly refers to the State’s interpretation as a “policy” preference. (Br. ii, iii, 2, 3, 9, 16, 17, 19). He is conflating policy with purpose. The purpose of R.C. §959.131(C) is to

prohibit knowingly causing serious physical harm to any cat or dog, among other companion animals, and to punish such violations at the felony level. This purpose is not a policy preference of the State; it is clearly indicated in the text and history of the statutory scheme.

It should be noted that the State's interpretation is the *textually* permissible interpretation. But the State has provided the Court with legislative and statutory history. Rightly or wrongly, the General Assembly has determined the Court can consider this information "in determining the intention of the legislature[.]" R.C. §1.49. Statutory history should be emphasized because it "form[s] part of the context of the statute," such that "a change in the language of a prior statute presumably connotes a change in the meaning." Scalia and Garner at 256. The statutory history reflects the Ohio's animal cruelty statutes have evolved over time to *expand* protection of animals, particularly dogs and cats.

The interpretation advanced by Kyles and the Eighth District is not reasonable because it frustrates the purpose of the statute. The State and its Amici explain the various ways in which Kyles' interpretation renders the statute useless. *See* Brief of Ohio Federation of Humane Societies et al. at p. 13; Brief of Animal Legal Defense Fund et al at p. 13-17; Brief of Ohio Animal Advocates at p. 9; Brief of Alley Cat Allies at p. 11-12 and 15-16. Namely, it leaves lost and abandoned dogs and cats without enhanced protection. It would also fail to protect dogs and cats that have not "received care" by virtue of a caretaker or someone else causing them serious physical harm. Recall the offender who threw the unowned kittens out of his moving vehicle, running them over. He certainly did not provide care or maintenance.

"The presumption against ineffectiveness ensures that a text's manifest purpose is furthered, not hindered." Scalia and Garner at 63. The presumption against ineffectiveness flows from the belief that "interpretation always depends on context, * * * context always includes

evident purpose, and * * * evident purpose always includes effectiveness." *Id.* In short, the General Assembly does not enact useless laws. *See United States v. Castleman*, 572 U.S. 157, 178 (2014) (Scalia, J., concurring). When the "purpose and object of the statute would be defeated; the absurdity of such construction is therefore apparent." *City of Philadelphia v. Ridge Ave. Passenger Ry. Co.*, 102 Pa. 190, 196, 40 Legal Int. 367, 31 Pitts. Leg. J. 109 (1883).

The State's textually permissible interpretation, "any dog or cat", furthers rather than obstructs the purpose of R.C. §959.131, so it should be preferred.

F. Kyles' remaining arguments lack merit.

1. Kyles ask the Court to consider the phrase, "Dinner tonight will be vegetables, regardless of how they are cooked." (Br. 1, 12). He concludes the vegetables will be cooked. This is not a foregone conclusion. The only absolute is dinner tonight will be vegetables. He goes on to assert that, "'regardless of where it is kept' is an exhaustive open conditional construction that requires that 'it' be 'kept'" (Br. 12). The phrase is more accurately described as a universal exhaustive conditional, which says that the main clause is true in all members of a set of conditions given by the complement of "regardless of." It means it is true whatever the answer to the question: where is the dog or cat kept?

It does not matter how the grammatical structure is identified because "any dog or cat" is absolute. The phrase "any dog or cat regardless of where it is kept" covers every possible place a dog or cat is. It does not matter where the dog or cat is kept, the the main clause holds anyway. Here is an example from the Corpus of Contemporary American English (COCA), a vast online collection of written and spoken English available at corpus.byu.edu/coca, to demonstrate the same.

> Mr. Sinatra: I like being with the public under almost any circumstance, regardless of where it is or why so that I do my utmost to fulfill that responsibility as a

> performer and as a man in public life. Sinatra, *Living with the legend; the life and career of singer Frank Sinatra*. CBS 48 Hours 1998.

The main clause holds – Mr. Sinatra liked being with the public under almost any circumstance. It did not matter where it was or why.

2. Kyles asks the Court to dismiss this matter as having been improvidently allowed because "no other Ohio prosecutor has made the argument the state has made and properly lost[.]" (Br. 2). To begin, Kyles' statement is purely anecdotal. But even so this Court has already determined the issue in this case presents an issue of great general or public interest. A case should not be dismissed as improvidently allowed because it represents an issue of first impression. That is exactly why the Court should hear the matter. The case provides an opportunity for the Court to give guidance to judges, practitioners, and the public.

3. Kyles correctly asserts that "[t]he General Assembly made the reasonable policy judgment to provide higher penalties for abusing household pets." (Br. 2). This is true, but it is only part of the rationale for the law. Another rationale was that abuse of animals, irrespective of whether they are household pets, is a predictor of violent behavior and should be punished/monitored. There are countless examples of seral killers and mass shooters who tortured and killed community cats, dogs, and other animals.

4. Kyles argues the State only addresses part of the Eighth District's definition of "kept." (Br. 17). In his view, the broader definition of "physical control" would avoid some of the absurd results. (Br. 18).[2] Kyles wrongly asserts, "the Eighth District did not, as the state claims, hold that the animal must "receive care" to be a "companion animal" under R.C. 959.13(A)(1)." This is easy to clear up. The Eighth District held, "[i]n the case of cats and dogs, the state must establish that

[2] Apparently he is conceding that his interpretation makes the statute ineffective.

the cat or dog received care * * * [.]" *Kyles*, 2023-Ohio-2691, ¶ 17.[3] The Court continued, "[t]he state failed to produce evidence that resulted from the care or maintenance of the cat." Id. at ¶ 18. In doing so, the Court of Appeals exceeded its authority by creating an additional evidentiary burden for the State.

The State did not ask the Court to consider whether the kitten in this case was "kept" because the text reflects the General Assembly's preference for a bright line rule. If, however, the Court is persuaded that the Eighth District held "under physical control" suffices then the Court can summarily reverse. The kitten in this case did not open the door and let itself into the building and once inside he was in fact under physical control.

5. Kyles argues that if the General Assembly wanted all cats and dogs to be "companion animals," it could have written what the Maine Legislature did: "'Companion animal' means a cat or dog." Me.Rev.Stat. tit. 7, 3907, 11-A. (Br. 15). Our state statute is arguably more encompassing because it includes the language "any dog or cat" leaving no doubt the law protects every and all dogs and cats. The language that is different, "regardless of where it is kept", is here because of concern with location not the status of the dog or cat. (pet store add on, kennel owners (Nitro's law)).

6. Finally, Kyles argues for application of the rule of lenity. (Br. 15-16). It should not apply. The issue in this case is whether R.C. §959.131(A)(1) requires the State to establish that the seriously injured dog or cat received care? This question has a correct answer, and that answer lies

[3] It should be noted that amicus Animal Legal Defense Fund pointed out that the court of appeals defined "kept" as either "having control" or "to take care of"—but then appeared to decide the case only on whether the cat was cared for. It did not analyze control. (Br. 7-9).

within the text of 959.131(A)(1) and the context of the overall statutory scheme. *See* Cass R. Sunstein, "Interpreting Statutes in the Regulatory State," 103 Harvard Law Review 405, 442 (1989) ("When taken in their setting - in their context and culture - statutes are usually susceptible to only one plausible meaning.")

The answer is no. The plain text of R.C. §959.131(A)(1) protects "any" dog or cat. Nothing in the statute requires the State to establish that the dog or cat received care or was under physical control.

The rule of lenity has no application when the statute is clear; it does not apply when the statute has only one plausible meaning. Scalia and Garner at 6. "The rule comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." *Callanan v. United States*, 364 U.S. 587, 596 (1961).

This Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing reply brief has been electronically filed with this Court and sent via electronic mail on this 7th day of May 2024 to counsel for appellee, Stephen P. Hardwick, Esq. at stephen.hardwick@opd.gov.

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