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 *AMICI CURIAE*, OHIO FEDERATION OF HUMANE SOCIETIES, dba OHIO ANIMAL WELFARE FEDERATION, CLEVELAND ANIMAL PROTECTIVE LEAGUE, and THE HUMANE SOCIETY OF THE UNITED STATES

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

J. JEFFREY HOLLAND (#0040089)
Holland & Muirden
1343 Sharon Copley Road
PO Box 345
Sharon Center, Ohio 44274
(330) 239-4480
Fax: (330) 239-6224
jjholland@hmlawohio.com
Attorney for *Amici Curiae*
The Ohio Federated Humane Societies,
d.b.a. Ohio Animal Welfare Federation;
the Cleveland Animal Protective League;
and The Humane Society of the United States

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SUMMARY OF ARGUMENT

Mr. Kyles was convicted of companion animal cruelty for knowingly causing serious physical harm to a cat. The 8th District Court of Appeals reversed that conviction, holding for the first time in Ohio that dogs and cats do not meet the definition of "companion animals" unless the State also proves that the animal was provided care by a person.

The appellate court misreads the plain meaning of the statute due to a singular and hyper-academic focus on the word "kept," causing an absurd result which is inconsistent with the current statutory scheme. In so doing, the appellate court adds a new element to the offense which was not provided for or intended by the legislature.

Even if the appellate court was correct in its interpretation, the court misapplied the word "kept" as it has been consistently interpreted in Ohio case law. In fact, the State did prove that that the cat was "kept," where there was proof that it was confined in an apartment building and was immobilized by Mr. Kyles in a pool of bleach.

STATEMENT OF FACTS

This matter seeks review of the 8th District Court of Appeals decision in *State v. Kyles*, 8th Dist. Cuyahoga No. 112202, 2023-Ohio-2691.

Mr. Kyles was convicted at trial 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 under review indicate that Kyles 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 prone and unable to move in the pool of bleach, suffering from chemical exposure. *Id*.

The 8th District reversed Kyles' 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). In so doing, the 8th District holds, for the first time in Ohio, that a cat is not a companion animal unless the State proves that it is "cared for or under physical control" of a person. *Id.*, ¶ 17.

STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*

The undersigned Amici Curiae, the Ohio Federated Humane Societies, d.b.a. Ohio Animal Welfare Federation ("**OAWF**"), the Cleveland Animal Protective League ("**CAPL**"), and the Humane Society of the United States ("**HSUS**"), and jointly submit this brief as *amici curiae* in support of the Appellant, State of Ohio.

A. **The Ohio Federated Humane Societies, d.b.a. Ohio Animal Welfare Federation**.

The Ohio Animal Welfare Federation is a non-profit organization formed in 1924 whose members are county humane societies, dog wardens, animal control officers, and non-profit animal welfare organizations across Ohio. The mission of OAWF is to promote the well-being and humane treatment of animals in Ohio through education, advocacy, and professional resources for animal welfare professionals, elected officials and law enforcement. OAWF organizes and hosts the mandatory training course required for Ohio humane society agents, and provides frequent educational opportunities and support for law enforcement officers and prosecutors who enforce Ohio laws relating to animal cruelty, neglect and abandonment. OAWF law enforcement members specifically voicing their support to the position of OAWF include:

- Animal Charity, the humane society serving Mahoning County
- Animal Welfare League of Trumbull County, the humane society serving Trumbull County
- Ashtabula County Animal Protective League, the humane society serving Ashtabula County
- Brown County Humane Society, the humane society serving Brown County
- Cincinnati Animal CARE, the humane society serving Hamilton County

- Columbiana County Humane Society, the humane society serving Columbiana County
- Columbus Humane, the humane society serving Franklin County
- Coshocton County Animal Shelter & Humane Animal Treatment Association, the humane society serving Coshocton County
- Cross Creek Township Police Department, a law enforcement agency
- Fayette Regional Humane Society, the humane society serving Fayette County
- Fort Defiance Humane Society, the humane society serving Fort Defiance County
- Friendship Animal Protective League, the humane society serving Lorain County
- Fulton County Humane Society, the humane society serving Fulton County
- Geauga County Humane Society, the humane society serving Geauga County
- Greene County Animal Control, the dog warden for Greene County
- Holmes County Dog Warden, the dog warden for Holmes County
- Humane Association of Warren County, the humane society serving Warren County
- Humane Society of Delaware County, the humane society serving Delaware County
- Humane Society of Greater Dayton, the humane society serving Montgomery County
- Humane Society of Greene County, the humane society serving Greene County
- Humane Society of Harrison County, the humane society serving Harrison County
- Humane Society of the Ohio Valley, the humane society serving Washington County
- Humane Society of Ottawa County, the humane society serving Ottawa County
- Humane Society of Summit County, the humane society serving Summit County
- Jefferson County Humane Society, the humane society serving Jefferson County
- Lake County Humane Society, the humane society serving Lake County
- Licking County Humane Society, the humane society serving Licking County
- Marion County Sheriff's Office/Dog Warden, the dog warden for Marion County
- Medina County SPCA, the humane society serving Medina County
- Miami County Animal Shelter, the dog warden for Miami County
- Portage Animal Protective League, the humane society serving Portage County
- Richland County Dog Warden, the dog warden for Richland County
- Scioto County Humane Society, the humane society serving Scioto County
- Toledo Area Humane Society, the humane society serving Lucas County
- Tuscarawas County Humane Society, the humane society serving Tuscarawas County
- Union County Humane Society, the humane society serving Union County
- Wyandot County Humane Society, Inc., the humane society serving Wyandot County

B. **The Cleveland Animal Protective League.**

The Cleveland Animal Protective League, formed in 1917, serves as the only county humane society for Cuyahoga County, Ohio. The CAPL is a non-profit animal welfare organization, which by statute serves as a law enforcement agency for animal cruelty related offenses. R.C. 1717.05 et seq. In addition to the operation of its state-of-the-art animal shelter

and other programs promoting animal welfare, CAPL appoints and employs humane society agents, who are trained law enforcement officers specializing in animal cruelty, neglect and abandonment. The CAPL responds to thousands of calls and prosecutes numerous criminal cases involving abuse, neglect, and abandonment annually.

C. **The Humane Society of the United States**.

The Humane Society of the United States is a national non-profit animal protection organization formed in 1954 with more than 10 million members and constituents. The HSUS's mission is to protect animals through public education, policy, litigation, investigation, science, advocacy and field work. The HSUS regularly assists state and federal law enforcement officials around the country, including Ohio, in the investigation and prosecution of animal cruelty.

ARGUMENT

Proposition of Law No. 1:

The plain language of R.C. 959.131(A)(1) provides that all dogs and all cats are "companion animals." The status of dogs and cats as "companion animals" does not turn on whether or not they are "kept" by a person.

A. **Statutory interpretation**.

"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. "An unambiguous statute is to be applied, not interpreted." *State*

ex rel. Autozone Stores, Inc. v. Indus. Comm. of Ohio, 2023-Ohio-633, 209 N.E.3d 933, ¶ 60-61 (10th Dist.) quoting *Sears v. Weimer*, 143 Ohio St. 312, 55 N.E.2d 413 (1944), paragraph five 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).

> Statutes relating to the same general subject matter are to be read in *pari materia* in order to determine legislative intent. *Sheet Metal Workers' Internatl. Assn., Local Union No. 33 v. Gene's Refrig., Heating & Air Conditioning, Inc.*, 122 Ohio St.3d 248, 2009-Ohio-2747, 910 N.E.2d 444, ¶ 38. "And, in reading such statutes *in pari materia*, and construing them together, this court must give such a reasonable construction as to give the proper force and effect to each and all such statutes." *Johnson's Mkts., Inc. v. New Carlisle Dept. of Health*, 58 Ohio St.3d 28, 35, 567 N.E.2d 1018 (1991).

Jacobson v. Kaforey, *supra*, ¶ 92.

B. **Legislative history of R.C. 959.131.**

As noted in the decision under review, *State v. Kyles*, 8th Dist. Cuyahoga No. 112202, 2023-Ohio-2691 (hereafter referred to as ***Kyles***) R.C. 959.13 has been the primary animal cruelty statute in Ohio for over one hundred and twenty years. R.C. 959.13 applies to all animals and remains unchanged since its last amendment in 1977. In 2003, the legislature enacted SB 221, creating R.C. 959.131, known as the "companion animal cruelty" law.

Both laws rely on the definition of "cruelty," "torment" and "torture" as being "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). Thus,

offenses relating to animal cruelty and neglect have always prohibited both ***deliberate*** acts and ***failures to act*** which cause unnecessary suffering since the 19th Century.

The primary differences between the two is that any offense under R.C. 959.13, regardless of whether it was a mere omission or a deliberate act of violence, is a second degree misdemeanor, and requires proof that the offender acted "recklessly." *State v. Ward*, 5th Dist. Fairfield No. 18-CA-19, 2019-Ohio-883; *City of Akron v. Donnelly*, 9th Dist. Summit No. 16821, 1995 Ohio App. LEXIS 699, (Feb. 22, 1995).

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. A person who acts "negligently" is generally charged with a second degree misdemeanor, enhanceable to a first degree misdemeanor on a subsequent conviction. (See R.C. 959.131(D); R.C. 959.99(E)(3).) A person who acts "knowingly" may be charged with a first degree misdemeanor on a first offense (R.C. 959.131(B); R.C. 959.99(E)(1)), or a felony if there is serious physical harm to the animal, or the offender operates a dog kennel. (R.C. 959.131(C) (F); R.C. 959.99(E)(2) (4)).

In more than twenty years since the original enactment of the companion animal cruelty law, the *Kyles* court is the first and only appellate court to hold that dogs and cats are not companion animals unless the State proves "that the cat or dog received care, regardless of the location or provider of the care." *State v. Kyles*, *supra*, ¶ 17.

C. **The plain language of the statute provides that all dogs and cats are companion animals**.

Mr. Kyles was convicted on one count of R.C. 959.131(C) which provides that "[n]o person shall knowingly cause serious physical harm to a companion animal."

"'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." R.C. 959.131(A)(1). There is no suggestion that dogs and cats are either "livestock" or "wild animals," so that portion of the statute can be set aside.

Two sets of living creatures qualify as "companion animals": (1) animals kept in a residential dwelling; and (2) dogs and cats. The portion of the definition which directly relates to this case involving a cat is as follows: "'Companion animal' means … any dog or cat regardless of where it is kept." *Id*.

"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*, *supra*, ¶ 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.

Under the normal rules of grammar, the nouns "dog or cat" 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." As an adjective, the word "regardless" has been defined as follows:

- "without being stopped or affected by (something)" Britannica Dictionary, https://www.britannica.com/dictionary/regardless.
- "despite everything" Mirriam Webster Dictionary, https://www.merriam-webster.com/dictionary/regardless.

- "despite; not being affected by something" Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/regardless.
- "having or showing no regard; heedless; unmindful (often followed by of)" Dictionary.com, https://www.dictionary.com/browse/regardless#google_vignette.
- "If something happens regardless of something else, it is not affected or influenced at all by that other thing." Collins Dictionary, https://www.collinsdictionary.com/us/dictionary/english/regardless-of

In other words, a companion animal is any dog or cat ***without regard*** to its "keeping." A plain reading tells us that ***all*** dogs and cats are companion animals. We are not to "regard," in fact we are required to disregard, whether or not they are "kept."

The appellate court appears to have stepped into a trap that can waylay even the best lawyers and academics: the temptation to excessively analyze a single word at the peril of losing sight of the whole. The appellate court's narrow focus on the word "kept" has led to an interpretation which flies in the face of a common person's understanding of plain language. The appellate court also failed to consider the full context of the statutory scheme which is necessary to understand the legislature's intent.

Mr. Kyles was convicted of a violation of R.C. 959.131(C). "No person shall knowingly cause serious physical harm to a companion animal." Serious physical harm is defined under R.C. 959.131(A)(12). Companion animal cruelty is a felony when the offender ***knowingly*** inflicts the most serious injuries or death upon a non-human creature. Notably, this subsection includes ***no*** requirement in that companion animal be confined, restrained or "kept." Of course, there would be no need to do so if we accept the *Kyles* conclusion that there must be proof in

every case that a dog or cat is "kept." But if the *Kyles* court is correct, then the misdemeanor section of the same statute makes little sense; or at the very least is unnecessarily duplicative.

Consider subsection (D) of R.C. 959.131 which creates a series of misdemeanor offenses for companion animal ***neglect***. Each apply ***only*** to a person who "confines or who is the custodian or caretaker" of a companion animal. Under this subsection, the legislature deemed it necessary to require proof that the offender confined or was the custodian or caretaker of the animal as an additional element of the offense; one which does not exist in R.C. 959.131(C). A person who "confines or is the custodian or caretaker" is clearly a "keeper" under the definition adopted by the opinion under review: "An animal is "kept" when there is evidence that it is cared for or under physical control." *State v. Kyles*, *supra*, ¶ 17.

Now look to subsections (E), (F) and (G) of R.C. 959.131. They 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." By contrast, subsections (B) and (C) do not.

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 or contradictory or both.

"'[T]he General Assembly is not presumed to do a vain or useless thing, and * * * when language is inserted in a statute it is inserted to accomplish some definite purpose.'" *Jacobson v. Kaforey*, 149 Ohio St.3d 398, 2016-Ohio-8434, 75 N.E.3d 203, ¶19, quoting *State v. Wilson*, 77 Ohio St.3d 334, 336, 1997-Ohio-35, 673 N.E.2d 1347 (1997); *State ex rel. Cleveland Elec. Illum. Co. v. Euclid*, 169 Ohio St. 476, 479, 159 N.E.2d 756 (1959).

"[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).

This means we must presume that the legislature had purpose and a reason for requiring proof of confinement or cared for in some portions of the statute but not in others. The *Kyles* decision presumes the opposite – that some of the language in R.C. 959.131 is useless and duplicative.

In fact, the Ohio legislature has a long history of making a clear distinction between offenses which require proof of confining or keeping an animal and those which do not. R.C. 959.13 is the general animal cruelty law, most frequently applied to livestock and other non-companion animals:

> **(A)** No person shall:
>
> **(1)** Torture an animal, deprive one of necessary sustenance, unnecessarily or cruelly beat, needlessly mutilate or kill, ***or impound or confine*** an animal without supplying it during such confinement with a sufficient quantity of good wholesome food and water;
>
> **(2)** ***Impound or confine*** an animal without affording it, during such confinement, access to shelter from wind, rain, snow, or excessive direct sunlight if it can reasonably be expected that the animals would otherwise become sick or in some other way suffer. ….

R.C. 959.13(A)(1) and (2), emphasis added.

Here we see that the requirement to provide adequate food, water and shelter require an additional element that the animal was "impounded or confined." A conviction for torturing or cruelly beating an animal does not.

D. **<u>The appellate court decision incorrectly adds a new element to all offenses of companion animal cruelty to dogs and cats which does not appear in the statute</u>**.

The most alarming aspect of the appellate court's decision is that it adds a new element to crimes under R.C. 959.131 relating to dogs and cats. The appellate court did not merely hold that the State must prove that an animal is "kept" to qualify as a companion animal; it interpreted the word "kept" in an expansive and vague manner that is inconsistent with current case law.

Specifically, the appellate court held that "In 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." *State v. Kyles*, 8th Dist. Cuyahoga No. 112202, 2023-Ohio-2691, ¶ 17, emphasis added. The *Kyles* court relies chiefly on two cases in reaching this conclusion: *State v. Hartman*, 9th Dist. Summit No. 26250, 2012-Ohio-4694; and *Buettner v. Beasley*, 8th Dist. Cuyahoga No. 83271, 2004-Ohio-1909.

State v. Hartman, 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." If so, they would be excluded as "companion animals" by definition. ("'Companion animal' does not include livestock or any wild animal." R.C. 959.131.)

Hartman first chased around statutory definitions of "wild animal," "wild birds," "game birds" and "migratory game birds" without reaching a definitive answer. Ultimately, it concluded that parrots and the like ***were*** companion animals because of a "reasonable inference that the birds at issue were domesticated and, thus, not wild." *Hartman* at ¶ 24. The court noted that these species of birds that would be "familiar" to the average person, and that "birds such as parrots and parakeets are often kept in cages as pets." *Hartman*, at ¶ 24. Then the court cited *Newman v. Cleveland Museum of Natural History*, 143 Ohio St. 369, 378, 55 N.E.2d 575 (1944) which holds that a court may take judicial notice that an elephant is a wild animal because it is a

matter of common knowledge. In short, the decision did not turn on being "kept" or not being "kept," but on the common understanding that birds like these are regularly considered to be pets.

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 dogs who harm people. The *Buettner* court does not address the meaning of the word "kept" (past tense of "to keep"), but does attempt to shed light on the related noun, "keeper." The paragraph specifically cited by the appellate court is as follows:

> The terms "owner," "harborer" and "keeper" are not statutorily defined, but rather we refer to case law for their definitions. An "owner" is the person to whom the dog belongs. A "keeper" is the person who has physical care or charge of the dog. And finally, a "harborer" is one who, "has possession and control of the premises where the dog lives, and silently acquiesces to the dog's presence." However, ***it is clear that there is no ironclad definition of the term "keeper.***" Many courts have used the elements of physical control, care and custody of the animal to determine whether someone meets the requirements of a keeper, but each case is distinguishable on its facts and each case must be considered on its own merits. This is the province of the jury, and the judge properly reserved this determination for their review.

Buettner v. Beasley, id. at ¶ 14, emphasis added.

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 for a court to apply. Yet that ambiguity is not reflected in the case at bar when it concludes that, in order to qualify as a companion animal, "the state must establish that the cat or dog ***received care***, regardless of the location or provider of the care." *State v. Kyles*, *supra*, ¶ 17, emphasis added.

The *Kyles* court ventures further than *Buettner*, transforming and extending the words "kept" or "keeper" into the even more specific concept of the ***caretaker***, or a person who provides care. The *Buettner* court does not reach this conclusion. Indeed, no Ohio court has.

The *Kyles* ruling raises more questions than it resolves.

Is an unsocialized, feral, adult cat a "companion animal" today simply because a good Samaritan gave it food (care) for one day many years ago?

What qualifies as "care?" If a person once left a cardboard box in the woods for a colony of feral cats, have all of those cats been transformed for life into "companion animals?"

Bringing the analysis closer to the case at bar, what if there was evidence that a cat was "kept" or otherwise enclosed inside a residential apartment building? But more on that later.

The result is as absurd as it is vague. Under the *Kyles* rule, a cat that is deliberately caught in a trap is still not "kept" unless that cat is provided with "care."

What is abundantly clear is that a requirement to prove that an animal received "care" from a human being at some point in history exists nowhere in the statutory definition.

The appellate court misconstrued the clear and unambiguous definition of "companion animal" by isolating and excessively emphasizing the word "kept," and then going further to require proof that a dog or cat was also provided with care by a person, therefore its decision in *Kyles* should be overturned.

Proposition of Law No. 2:

There is sufficient evidence that an animal is "kept" by a person where (a) the animal is confined in a residential building or its movement is otherwise restricted, or (b) there is evidence that the animal has been cared for at some time, or (c) where the animal is immobilized by a person.

The *Amici Curiae* assert that the *Kyles* court erred by concluding that a dog or cat must be "kept" in order to qualify as a "companion animal," as argued in Proposition of Law No. 1 above. But even if this Court comes to a contrary conclusion, there is still sufficient evidence that the cat ***was*** "kept" to support the guilty verdict.

A. **Standard of review for insufficiency of the evidence**.

The *Kyles* court found that there was insufficient evidence to prove that the cat that was harmed was a "companion animal." In making this determination, a reviewing court must view the evidence in the light most favorable to the prosecution, to determine whether any rational trier of fact could have found the essential elements of the crime are proven beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259, 274, 574 N.E.2d 492 (1991). A review of the evidence includes reasonable inferences arising from that evidence. *State v. Thomas*, 7th Dist. Mahoning No. 22 MA 0100, 2023-Ohio-2291, citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

When conducting a review of sufficiency of the evidence, direct evidence and circumstantial evidence are of equal weight, and in that regard are indistinguishable. *State v. Roberts*, 8th Dist. Cuyahoga No. 91086, 2008-Ohio-5750, citing *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492.

"Circumstantial evidence 'is defined as 'proof of facts or circumstances by direct evidence from which [the factfinder] may reasonably infer other related or connected facts that naturally and logically follow according to the common experience of people.'" *State v. Howard*, 8th Dist. Cuyahoga No. 105327, 2017-Ohio-8734, ¶ 5, quoting *State v. Shabazz*, 146 Ohio St.3d 404, 2016-Ohio-1055, 57 N.E.3d 1119, ¶ 18, quoting *Ohio Jury Instructions*, CR Section 409.01(4) (Rev. Aug. 17, 2011).

B. **<u>"Keeper" is broadly defined</u>**.

Whether or not someone qualifies as a "keeper" of an animal has been consistently and broadly construed.

In *State v. Amos*, 2014-Ohio-3097, 17 N.E.3d 9, ¶ 20 (5th Dist.) an animal abandonment case, the defendant was deemed to be the "keeper" of a feral, stray kitten by picking it up only long enough to drop it off at a veterinarian's parking lot. The defendant never owned the kitten.

A veterinary assistant bitten by a client's dog may be a "keeper" of that dog even though she merely assists the veterinarian. *Manda v. Stratton*, 11th Dist. Trumbull ACCELERATED CASE NO. 98-T-0018, 1999 Ohio App. LEXIS 2018, at *2 (Apr. 30, 1999).

A non-owner who holds the leash of a dog for a friend for only a few minutes is a "keeper." *Marin v. Frick*, 11th Dist. Geauga No. 2003-G-2531, 2004-Ohio-5642.

An employee at a dog grooming business could be a "keeper" by merely approaching a client's dog on the business premises to help control it, ***even though she had not yet touched the dog*** when she was bitten. "Based upon this precedent, we find that a person who is responsible for exercising physical control over a dog is a "keeper" even if that control is only temporary." *Lewis v. Chovan*, 10th Dist. Franklin No. 05AP-1159, 2006-Ohio-3100, ¶ 12.

In short, even the most minimal restraint, or any attempt to confine, control or restrain an animal, has been sufficient to prove that the animal was "kept." The standard which the *Kyles* decision attempts to establish proposes that "the state must establish that the cat or dog received care, regardless of the location or provider of the care" in order to qualify that creature as a "companion animal." *State v. Kyles, supra*, ¶ 17, emphasis added.

C. <u>There was sufficient, credible evidence for the Trial Court to conclude that that the cat was "kept," and was therefore a "companion animal</u>."

Even if, *arguendo*, the *Kyles* test were to be accepted by this Court as the new standard, there is sufficient evidence, when viewed in a light most favorable to the State, that the cat was "kept," as that word is construed by *Kyles*.

First, the cat was confined or "kept" inside a residential apartment building. *Kyles* asserts that the "mere presence in the building [of the cat] is insufficient to prove that the cat was kept," *State v. Kyles*, ¶ 18, but provides no reason why the court reached that conclusion.

Common experience tells us that cats cannot open doors or otherwise penetrate closed apartment buildings, unless they are allowed in by a person. There was no evidence that the building had open, broken windows, or was otherwise unsecured. Wild, "untamed" cats do not approach when called. They run away.

While one can envision other *possible* ways for a feral cat to enter a residential apartment building, it is reasonable to infer the most likely circumstance: A person let the cat in. Whether the animal was coaxed in, or whether it was a resident's unclaimed pet is irrelevant. A reviewing court violates its duty to view the evidence in a light most favorable to the State by engaging in speculation which presumes facts not in evidence.

The building both confined the cat and provided it with shelter; either of which meet the *Kyles* requirement that the animal was "kept" by a person.

Second, there was testimony at trial that the front paws of the cat were declawed. The investigating officer believed the animal was "obviously someone's house cat. It wasn't a wild cat." (Trial Transcript 25, 33, 37). Declawing is a surgical procedure performed by a veterinarian that does not occur naturally. Again, the cat was "kept" or provided with care. The *Kyles* court concludes that the cat was not declawed because the veterinarian did not reach that specific

conclusion. In fact, the veterinarian testified that her priority was the health of the animal, and she did not examine whether or not the cat was declawed. (Trial Tr. 56.) Again, the appellate court appears to disregard positive, direct evidence that tends to prove any inference that the animal was "kept," ignoring or minimizing any evidence to the contrary.

Third, the cat did not behave like a feral cat. It submitted to handling and medical treatment without fear or aggressive conduct. We have that testimony from both the investigating officer and the veterinarian. (Trial Tr. 25, 44-45.) Notably, the Judge writing in concurrence in *Kyles* seems to agree: "I am not convinced this was a feral cat by the behavior exhibited upon treatment…" *Kyles*, at ¶ 23. If this was not a "feral" cat, it was at least partially tamed or provided with care by some person at some point in the past, thus meeting the *Kyles* test as a companion animal.

Fourth, the very conduct of Mr. Kyles caused him to be a "keeper" of the cat by ensnaring the animal in a pool of bleach.

The *Kyles* court refers to the Merriam-Webster definition of to "keep" in part "having control" of something. *Kyles*, *supra*, ¶ 15. By placing a large amount of a toxic chemical in an area known to be frequented by a cat, Mr. Kyles exerted the ultimate control over the animal. It was completely immobilized and close to death.

Even if this Court were to adopt the *Kyles* standard, there was sufficient evidence that the animal was "kept," and was therefore a companion animal, when viewing the evidence in a light most favorably to the State, therefore the appellate court decision should be overturned.

CONCLUSIONS

1. The appellate court misread the plain meaning of the definition "companion animal" due to a singular and hyper-academic focus on the word "kept," causing an absurd result

which is inconsistent with the current statutory scheme. In so doing, the appellate court has added a new element to the offense which was not provided for or intended by the legislature.

2. Even if the appellate court was correct in its conclusion that the State must prove that a dog or cat has been "kept" to qualify as a "companion animal," it failed to view the evidence in a manner most favorable to the State. There was ample evidence that the cat was "kept" by a person where there (a) it was confined in an apartment building; (b) it was declawed and otherwise behaved like a cat that was not feral; and (c) the offender immobilized the cat in a pool of bleach.

For the reasons set forth above, the appellate court decision should be overturned.

Respectfully submitted,

HOLLAND & MUIRDEN

/s/ *J. Jeffrey Holland*

J. Jeffrey Holland (#0040089)
1343 Sharon-Copley Road, P.O. Box 345
Sharon Center, Ohio 44274
(330) 239-4480; Fax (330) 239-6224
E-mail: JJHolland@hmlawohio.com
Attorney for *Amicus Curiae*
The Ohio Federated Humane Societies, d.b.a. Ohio Animal Welfare Federation; the Cleveland Animal Protective League; and The Humane Society of the United States

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

TASHA L. FORCHIONE: tforchione@prosecutor.cuyahogacounty.us, Counsel for Plaintiff-Appellant

2/27/2024
Date

/s/ *J. Jeffrey Holland*
J. Jeffrey Holland