IN THE SUPREME COURT OF OHIO

STATE OF OHIO, Appellee, vs. MICHAEL CARSWELL Appellant.	: : : : : : : : : :	Case No. 2006-0151 On Appeal from the Warren County Court of Appeals, Twelfth Appellate District, Case No. CA2005-04-047

BRIEF AMICUS CURIAE OF CITIZENS FOR COMMUNITY VALUES, URGING REVERSAL

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INTEREST OF AMICUS CURIAE

Citizens for Community Values (hereinafter referred to as "CCV" or "Amicus") is an Ohio non-profit public policy organization, formally affiliated with Focus on the Family as a family policy council. CCV and its sister organization, Citizens for Community Values Action, were the driving force behind the Marriage Amendment at issue in this litigation, and together collected approximately 500,000 signatures of Ohio voters in order to place the amendment on the ballot. CCV's President, Phil Burress, organized and chaired the Ohio Campaign to Protect Marriage, the political action committee which successfully campaigned in favor of the passage of the amendment. CCV's strong interest in this case is to ensure that the plain and unambiguous text of the Marriage Amendment is properly applied by this Court in the context of this case, and to prevent unwarranted judicial construction of the amendment which might diminish its operational effect. CCV believes a case such as this could lead to an inadvertent narrowing of the scope of the amendment by the Court, as the motivation is great to preserve an understandably popular statute in its present form. It is for this very possibility, of course, that certain amici participated before the court below in support of the State, and are likely to participate before this Court. CCV opposes the State's advocacy of the constitutional validity of R.C. 2919.25 in its present construction.

Because CCV's purpose in this filing lies exclusively in advocating that the text of the Marriage Amendment be respected, and to resist the diminishing suggestions found in the lower courts' written decisions, it takes no position on the allegations lodged against Defendant in this case. CCV deplores and condemns as abhorrent the acts of assault which occur between those who share what should be a sanctuary: the home. CCV believes the law should contain stiff penalties for those who perpetrate assaults on individuals with whom they reside, and CCV looks

forward to the state legislature's remedial efforts extending the application of the domestic violence law to all those now covered under its terms, as well as other similarly situated vulnerable persons, and all in a manner which conforms to the Ohio Constitution.

INTRODUCTION

This case involves a challenge to Ohio's domestic violence statute and, more specifically, the provision of that statute that creates a category of inclusion in the law's prohibition on harm directed toward "persons living as a spouse." The Defendant, who has been accused by the State of assaulting his live-in girlfriend (a "person living as a spouse"), has challenged the constitutionality of the domestic violence statute as applied against him by the State, under the recently enacted Marriage Amendment, Ohio Constitution Article XV, Section 11 (the "Marriage Amendment").

As this Court is no doubt aware, throughout the state numerous cases have proceeded in which criminal defendants challenged the constitutionality of R.C. 2919.25. Not uncommon to cases relating to marriage—and to relationships intended to approximate marriage—these cases have drawn considerable attention at the intermediate appellate court level from various amici curiae, including the ACLU of Ohio and Lambda Legal. These organizations are emphatically opposed to the exclusive design of marriage as constituted of one man and one woman, and are categorically in favor of grants of state imprimatur to non-marital intimate relationships. They are thus opponents of the recently enacted Marriage Amendment. While the attention these cases have drawn is not unusual, it is extremely unusual that these organizations, and particularly the ACLU, are found to be filing briefs in support of the *State* in a criminal matter. But as mentioned above, cases such as these present to them an opportunity to participate in the formation of legal precedent that may narrow the operation of the Marriage Amendment.

CCV urges this Court to reverse the lower court's decision. In support of this request, CCV intends herein to point out a number of flaws in the lower court's manner of evaluating the operation of the amendment, and dispel misapprehensions the court exhibited as to the categories of analysis implicated by the amendment.

STATEMENT OF FACTS

CCV adopts the Appellant's Statement of the Facts.

ARGUMENT

At the outset it should be noted that the compelling public policy arguments that support the domestic violence law are not germane to this case. For purposes of the narrow issue to be decided by this Court, it is wholly irrelevant whether it is good or bad policy for marriage-approximating relationships to be specifically identified as comprising a category of relationship to which the statute should make application. The only relevant question is whether the statute's category of cohabitation (i.e., "living as a spouse") grants a legal status to a relationship in a way that is prohibited by the Constitution. With that in mind, CCV's propositions of law are set forth below.

Proposition of Law No. I:

Because the Domestic Violence Statute and the Marriage Amendment are unambiguous, the Court is not called upon in this case to interpret or construe their meaning; its task is limited solely to that of application.

The Ohio domestic violence statute, R.C. 2919.25 (the "Statute"), in relevant part reads as follows:

> (A) No person shall knowingly cause or attempt to cause physical harm to a family or household member. ***
>
> (F) As used in this section ***
>
> (1) "Family or household member" means any of the following:

(a) Any of the following who is residing or has resided with the offender:

(i) A spouse, a *person living as a spouse*, or a former spouse of the offender;

(2) "*Person living as a spouse*" means a person who is living or has lived with the offender in a common law marital relationship, who otherwise is cohabiting with the offender, or who otherwise has cohabited with the offender within five years prior to the date of the alleged commission of the act in question.[1]

(Emphasis added.) The Ohio Constitution, Article XV, Section 11 (the "Marriage Amendment."), states:

> Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.

It is a cardinal rule of constitutional and statutory construction that a court is to consider "the common and ordinary meaning of the terms contained within [the] Constitution in order to interpret them properly." *State ex rel. Lake Cty. Bd. of Commrs. v. Zupancic* (1991), 62 Ohio St.3d 297, 300, 581 N.E.2d 1086. The terms in the Statute and the Marriage Amendment are common terms with ordinary meanings. Neither contains terms or provisions that are ambiguous.

Indeed, the statutory definition which is alleged to contradict the Marriage Amendment—"person living as a spouse"—is plain and easy to understand. It requires no construction by this Court. Likewise, read intelligently and without predisposition, the meaning of the Marriage Amendment is readily ascertainable from the words used. See *State v. McKinley*, 2006-Ohio-

[1] The Ohio Supreme Court in *State v. Williams* (1997), 79 Ohio St.3d 459, 465, 683 N.E.2d 1126, has interpreted "cohabitation" as "(1) sharing of familial or financial responsibilities and (2) consortium."

2507, at P13 ("The first sentence of the *** Marriage Amendment is clear and unambiguous in defining marriage as "a union between one man and one woman[.] The second sentence of the amendment is also clear and unambiguous ***.").[2]

In light of the clear and unambiguous meaning of both the Statute and the Marriage Amendment, this Court's role is necessarily limited, for "[t]here is no need *** to interpret or construe the meaning of [a constitutional provision or] statute when it may be understood from its plain language." *State ex rel. Watkins v. Eighth Dist. Court of Appeals* (1998), 82 Ohio St.3d 532, 537, 696 N.E.2d 1078[3]; see, also, *State ex rel. Wallace v. Celina* (1972), 29 Ohio St.2d 109, 112, 279 N.E.2d 866 ("[a]lthough the above-quoted statements cited by relator set forth valid principles of statutory or constitutional construction, they are to be utilized only when the language being construed is 'obscure or of doubtful meaning.'"); *Sears v. Weimer* (1944), 143 Ohio St. 312, 55 N.E.2d 413, at paragraph five of the syllabus ("Where the language of a [constitutional provision] is plain and unambiguous and conveys a clear and definite meaning there is no occasion for resorting to rules of statutory interpretation."). About this particular rule of construction, this Court long ago noted that it is "one of long standing in the federal courts, as well as in our own." *Cleveland Trust Co. v. Eaton* (1970), 21 Ohio St.2d 129, 138, 256 N.E.2d 198.

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[2] Because the Statute is clear and unambiguous, the court below erred in construing the Statute, rather than merely applying it as written, and compounded that error by construing it liberally in order to save it from constitutional infirmity. *State v. Carswell*, 2005 Ohio 6547, at P7. Other appellate courts, while ultimately reaching the appropriate conclusion, have similarly erred in this respect. See, *e.g.*, *State v. Logsdon*, 2006-Ohio-2938, at P12.

[3] The rules of construction governing statutes are also applicable to the construction of constitutional provisions. See *State ex rel. Wallace v. Celina* (1972), 29 Ohio St.2d 109, 112, 279 N.E.2d 866.

Proposition of Law No. II:

The Statute creates and recognizes a "legal status" for a marriage-approximating relationship.

The domestic violence statute's inclusion (in the list of relationships containing potential victims of domestic violence) of the relationship of the alleged offender and a "person living as a spouse" is certainly a relationship that intends to approximate (one or more of) the "design, qualities, significance or effect of marriage." As noted by the court below, the Marriage Amendment prohibits the State from creating or recognizing a *legal status* for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage. Thus, whether the challenged provision of the domestic violence statute violates the Ohio Constitution hinges on whether the State has created or recognized such a "legal status" for that relationship, and whether that legal status is intended to approximate marriage. CCV proposes that such a prohibited status indeed has been accomplished in the domestic violence statute.

A hypothetical may assist in expounding this point. If the domestic violence statute were to prohibit violence by those in a "domestic partnership" relationship, and went on to define that relationship in the statute (in a way consonant with its use in common parlance), that obviously would thereby create a legal status for the domestic partnership relationship. That legal status then determines whether the constituent members of that relationship are susceptible to prosecution for domestic violence when engaging in certain conduct. The factual status of "domestic partnership" is exalted to "legal status" upon its recognition and definition in a legislative enactment which makes that relationship relevant to the operation of state laws. Because the State intends to enshrine that relationship into its law, that statutory placement

inescapably is one intending to describe a domestic partnership for what it is, and give it status as such.

The court below erred in its application of the term "legal status" to the Statute. Appealing to the definition of "status" in Webster's Dictionary, the Court concluded that the Statute "does not determine 'the nature of the legal relations to the state or to other persons' that a cohabitant may enter, nor does it determine a cohabitant's legal capacities." *Carswell*, at P18. This conclusion is incorrect for two reasons. First, the focus is inappropriately aimed at the legal status of a singular "cohabitant," rather than the legal status of the *relationship* of the cohabitants. Second, the Statute does establish the nature of the legal relations between the two cohabitants. The "legal status" created is the relationship between persons "living as a spouse" with the other (i.e., cohabiting), from which certain legal relations, both to each other and to the state concerning the application of the domestic violence laws, are established. Indeed, apart from the creation of the legal status of "living as a spouse," there would be no legal relationship between the parties vis-à-vis the application (or potential application) of the domestic violence laws. The fact that the scope of the Statute is narrow and that it "classifies a cohabitant as one of many potential victims," *id.*, is not relevant.

Proposition of Law No. III:

The "legal status" created and recognized in the Statute intends to approximate marriage in design, qualities, significance or effect.

The court below (albeit in *dicta*) accentuated its misunderstanding of the meaning of the Marriage Amendment in the manner in which it approached the approximation to marriage of relationships which may not be granted legal status. The court mistakenly offered that, "[e]ven if we construed R.C. 2919.25 to create or recognize a 'legal status for relationships of unmarried individuals,' the statute would still be constitutional because it does not 'intend to approximate

the design, qualities, significance, or effect of marriage.' The language of the *statute* expresses no such intent." *Carswell*, at P19 (emphasis added).

But this is not what the Marriage Amendment prohibits. The text of the amendment calls for a focus on what is intended by the *legal status* for the relationship, not the Statute. In *State v. McKinley*, 2006-Ohio-2507, the Third Appellate District properly interpreted the Marriage Amendment on this point, stating the "*relationship* must intend to approximate marriage, not the statute itself." (Emphasis in original.) *Id.* at P26. For the status is inextricably bound up in the purpose of the relationship referenced in the statute. The intention for the appearance of the relationship in a statute as a relationship of legal consequence cannot be divorced from the purpose of the relationship itself, for the statutory recognition countenances the referenced relationship *as it is*. Thus, if the relationship is one intending to approximate marriage in a relevant respect, then so also does the legal status. The legal status simply mirrors the relationship's factual nature in its grant of legal recognition. There is no divide between the two.

An additional and significant error in the lower court's presentation was its ignoring the distinction between the status of a relationship, and the benefits which are assigned as a result of membership in that relationship given the status. On page 6 of the court's opinion, the court exemplifies this defining confusion.

> The statute does not permit unmarried individuals to enter into a legally binding, marriage-like relationship with each other. It does not give an unmarried individual the right to inherit from an intestate cohabitant, the right to make medical decisions on a cohabitant's behalf, the right to file a joint tax return with a cohabitant, or any other of the hose of rights associated with marriage.

While all of these assertions may be accurate, they are also irrelevant to the question of whether the statute creates or recognizes a legal status for a relationship that approximates marriage in design, qualities, significance or effect. Clearly, creating a legal status for unmarried

couples in marriage-like relationships is a violation of the Constitution. But the "rights and benefits analysis" adds nothing to this conclusion, and it can only mislead. Whichever right, obligation, or benefit the state will subsequently assign (or not) to those in the marriage-approximating relationship is irrelevant. The focus of the second sentence of the Marriage Amendment is not on the benefits or obligations assigned to those in the relationship which is given a legal status—it is on the *status itself*. These two matters (benefits and status) must be assiduously distinguished for the amendment to be properly understood.

The Marriage Amendment does *not* proscribe the extension of benefits to persons in marriage-mimicking relationships. Rather, it proscribes *the very legal recognition* of the relationships in the first place, for any purpose. Thus, for instance, if the State were to want to grant medical benefits to all those who "reside with state employees," the marriage amendment would extend no prohibition to this—even though many of these benefits-receiving co-residents qualified thereunder may well be in a marriage-mimicking relationship (*e.g.*, domestic partnerships). Because the State (in this hypothetical) would extend this benefit on grounds *other than* the presence of a marriage-approximating relationship, the Marriage Amendment has no application. Conversely, if a legal status were given to a marriage-approximating relationship, with no concomitant grant of a benefit or obligation that is customarily associated with marriage, the status is nonetheless quite clearly prohibited by the Constitution. A benefits evaluation is not part of the juridical equation.

Accordingly, to bring this idea to the matter here in dispute, the domestic violence law could *properly* criminalize violence by a person against a cohabiter, if the law were drafted to prohibit harm against a "household member" that indeed was defined to include all "members of a household," or all those who reside together. This would certainly encompass those

cohabiting, or "living as spouses," as well as dorm-mates, live-in nannies, and the like. But again, the propriety of this extension exists because in such a case no relationship which intends to approximate marriage in relevant respects has been given a legal status by the law; rather a broader, benign category of persons would be protected (which may properly encompass those in relationships which may not be given *independent* legal recognition).

The problem with the domestic violence statute is that it creates a category of relationship for unmarried couples living as spouses. Had "household members" been more broadly defined (and with more terminological consistency), no constitutional problem would be here presented. This is why the remedy is so simply accomplished. By making this change, the legislature would thereby include in its coverage and extend the penalties against those who act violently toward those who share their home, but who are not "living as spouses," such as roommates. Both of these latter categories of persons are just as susceptible to the particular dangers that are sought to be addressed by the present domestic violence statute, but these persons have been excluded from coverage under the law for undetermined reason. Making this appropriate change to the law to embrace all household members rather than simply those now listed in the statute would maintain the present penalties against those who harm those "living as their spouse" (without so designating them), while also extending this treatment to others similarly situated.[4]

Of course, and most relevantly, this would also remove the constitutional defect with the law. The Marriage Amendment does not proscribe the receipt of benefits or obligations by persons in marriage-approximating relationships; it proscribes the government's formal recognition of such relationships in the law. The Marriage Amendment intends that marriage remain unique in being the only state-recognized relationship of its type. While an unlimited

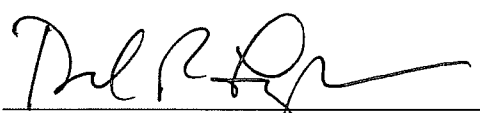
[4] A bill that would amend the domestic violence statute to this effect has been introduced in the Ohio legislature.

number of protections, benefits, or obligations may be extended to all persons in Ohio, regardless of the kind of relationships these persons maintain, those protections, benefits or obligations many *not* be extended by the State to them *because of* a person's membership in the marriage-approximating relationship. The State may deal however it wishes with *individuals*; it may *not* recognize a legal status for marriage-approximating *relationships*.

CONCLUSION

For the foregoing reasons, the appellate court's decision should be reversed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Brief Amicus Curiae was served upon the following counsel via regular U.S. mail this 19th day of June, 2006:

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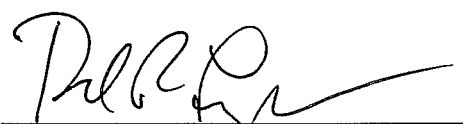

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