

IN THE SUPREME COURT OF OHIO

MICHAEL S. CARSWELL, : Case No. 06-0151
Appellant, : On Appeal from the Warren County
Court of Appeals,
vs. : Twelfth Appellate District
STATE OF OHIO, :
Appellee :

**MEMORANDUM OF *AMICUS CURIAE*
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
IN SUPPORT OF APPELLEE STATE OF OHIO**

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INTEREST OF AMICUS CURIAE

Lambda Legal Defense and Education Fund, Inc. (“Lambda Legal”) is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people, and people with HIV. Lambda Legal has hundreds of Ohio members whose interests are represented by its Midwest Regional Office in Chicago.

Concerned that laws and constitutional provisions that limit some individuals’ rights, protection, and access to the political process not be construed to place further burdens and restraints on basic civil rights, Lambda Legal has participated as *amicus curiae* in numerous Ohio cases presenting the legal issues before the Court in this case. Lambda Legal’s explication of Ohio law was adopted by the court below and other courts.

Lambda Legal appeared as *amicus curiae* in the case below, *see State v. Carswell*, Warren App. No. CA2005-04-047, 2005-Ohio-6547 (“Carswell”), and in similar Ohio cases, including *State v. McIntosh*, Montgomery App. No. CA 21093, 2006-Ohio-1815, *State v. Burk*, Cuyahoga App. No. CA-05-086162, 2005-Ohio-6727, *State v. Rodgers*, 166 Ohio App.3d 218, 2006-Ohio-1528, --- N.E.2d ---, *City of Cleveland v. Voies*, Cuyahoga App. No. CA-05-086317, 2006-Ohio-815, *State v. Steineman*, Greene App. No. 2005 CA 0046, 2006-Ohio-1818. Lambda Legal is also counsel for intervenors in *Brinkman v. Miami University et al.*, Butler Co. C.P. No. CV 2005 11 3736 (Filed Nov. 22, 2005), (representing employees of a state university in a challenge to the university’s employment-related domestic partner benefits on the ground that such benefits violate Article XV, Section 11). Lambda Legal has appeared previously in numerous other Ohio

cases as counsel or *amicus* including *In re J.D.M.*, Warren App. No. CA2004-04-040, 2004-Ohio-5409; *In re Bonfield*, 97 Ohio St.3d 387, 2002-Ohio-6660, 780 N.E.2d 241; *In re Maloney*, 96 Ohio St.3d 307, 2002-Ohio-4214, 774 N.E.2d 239; *In re Bicknell*, 96 Ohio St.3d 76, 2002-Ohio-3615, 771 N.E.2d 846; *State v. Thompson*, 95 Ohio St.3d 264, 2002-Ohio-2124, 767 N.E.2d 251; and *State v. Bird*, 81 Ohio St.3d 582, 1998-Ohio-606, 692 N.E.2d 1013; *Inscoc v. Inscoc*, 121 Ohio App.3d 396, 700 N.E.2d 70. Because of its interests and unique expertise, Lambda Legal respectfully submits this brief *amicus curiae* to assist the Court in proper resolution of this appeal pursuant to Ohio Supreme Court Rule IV (6).

STATEMENT OF FACTS

Amicus curiae adopts and incorporates the Statement of Facts set forth in the merit brief of Appellee State of Ohio.

ARGUMENT

In the November, 2004, general election, voters passed “Issue 1,” an amendment to the Ohio Constitution, now titled Article XV, Section 11. According to the plain language of its second sentence, Article XV, Section 11 applies only if both of the following two conditions are met: 1) a challenged law creates or recognizes a “legal status”; and 2) such legal status “intends to approximate the design, qualities, significance or effect of marriage.” The Court of Appeals below correctly held that the domestic violence law meets neither condition, let alone both. *Carswell, supra*, at ¶18-21. It therefore is unaffected by Section 11.

Appellant argues that Section 11 should be untethered from its language and construed to prevent “any legal recognition” of relationships between unmarried people.

He claims that the domestic violence law is unconstitutional as applied to him because it provides protection to unmarried individuals battered within dating relationships, and Appellant is not married to the person he is accused of assaulting. (Appellant's Merit Brief at 2-9.) His claim must be rejected under basic principles of constitutional and statutory interpretation because it relies on an overly broad and illogical reading of Article XV, Section 11, and wrongly confuses statutory protections with establishing a legal status. Further, even if the domestic violence law could be interpreted to conflict with Article XV, Section 11, the issue here is whether it *must* be construed to be in conflict. Under well-established rules of construction the Court must uphold a statute's validity unless it appears beyond a reasonable doubt that the legislation and constitutional provision are clearly incapable of coexisting. *State ex. rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, 147, 128 N.E.2d 59.

Properly construed, Article XV, Section 11 has no impact on R.C. 2919.25, Ohio's domestic violence law. The term "legal status" used in the amendment has a specific and limited meaning in the context of personal relationships. A "legal status" refers exclusively to a lasting legal relationship, initiated and terminated only by law. It confers bundled rights and/or obligations, and determines the legal relations into which a person may enter with respect to the State and third parties. Examples include the legal statuses of spouse, parent, custodian, or guardian. *See Carswell* at ¶17. The domestic violence law does not create a legal status.

Appellant attempts to extract such status from the language of the domestic violence law, which makes it a crime for anyone to threaten, harm, or attempt to harm a "family or household member," and defines a "family or household member" as

including a “person living as a spouse.” R.C. 2919.25. In turn, a “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.” R.C. 2919.25 (F) (2). That the relationships of some unmarried cohabitants may be described in similar terms as spousal relationships is immaterial. The domestic violence law does not make unmarried cohabitants’ relationships permanent, require them to go to court to terminate them, cause third parties or the state to treat them as spouses, or determine their legal capacities to enter into relations with others. The domestic violence law gives the relationship no legal relevance in any other context and therefore does not involve a legal status.

Additionally, even if the domestic violence law had created a legal status, such status does not “approximate the design, qualities, significance or effect of marriage.” Marriage is an intentional undertaking, recognized by the state, which cannot be rescinded without court approval. It confers on a couple a vast panoply of rights, reciprocal obligations, and benefits, which include the right for spouses to inherit intestate, to make medical decisions on each other’s behalf, to file joint tax returns, and to take bereavement leave, to name just a few of hundreds of spousal benefits. *See Carswell* at ¶¶ 19, 20. A criminal law against violence from an intimate partner in one’s home does not approach the design, qualities, significance or effect of marriage.

The function of the domestic violence law is to protect Ohioans from abuse in their own homes. The proponents of the amendment concede that this is a lawful purpose under Article XV, Section 11, but claim that the statute must be redrafted to substitute

“roommate” for “living as a spouse.” Brief *Amicus Curiae* of CCV at 10,11. This is a distinction without a difference.

Finally, while *Amicus* strongly believes that Article XV, Section 11 is unconstitutional, this case presents no constitutional issues. The Court need not reach any because Article XV, Section 11 does not apply to the protections from violence provided by R.C. 2919.25.¹

Proposition of Law:

R.C. 2919.25 REMAINS CONSTITUTIONAL AFTER PASSAGE OF ARTICLE XV, SECTION 11 BECAUSE THE PLAIN LANGUAGE AND MEANING OF THE TWO PROVISIONS ARE COMPATIBLE AND THEY ARE EASILY RECONCILED.

Nothing in the Ohio Constitution permits batterers to avoid appropriate punishment, or leaves unmarried partner victims, including gay and lesbian victims, without a remedy they long have had. This Court should affirm the Court of Appeals’ determination that Article XV, Section 11 has no effect on the protections against domestic violence that Ohio law affords individuals who are not married.

Article XV, Section 11 provides:

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

¹ Interpreting Article XV, Section 11 so broadly as to preclude the ability of individuals to obtain protection under Ohio’s domestic violence statute based on their status would raise grave constitutional concerns and should be avoided. See *Romer v. Evans* (1996), 517 U.S. 620, 116 S.Ct. 1620; *In re Boggs* (1990), 50 Ohio St.3d 217, 221, 553 N.E.2d 676 (when interpreting laws, a court must avoid deciding constitutional issues “unless absolutely necessary”); *State ex rel. Clarke v. Cook* (1921), 103 Ohio St. 465, 134 N.E. 655 (same). Because this case is resolved fully by resort to the plain language of the amendment and the domestic violence statute, and therefore this Court need not proceed to further analysis of what Ohio voters intended in adopting Article XV, Section 11 or the amendment’s constitutionality. See, e.g., *State ex rel. Burrows v. Indus. Comm.* (1997), 78 Ohio St.3d 78, 81, 676 N.E.2d 519 (if the language of a constitutional amendment is clear, a court may not look beyond it).

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* (emphasis added).

Appellant argues that Ohio's domestic violence law violates the second sentence of Article XV, Section 11 by protecting unmarried cohabitants from domestic abuse. Specifically, he contends that under Article XV, Section 11, "unmarried persons can't be given the benefits afforded to married persons" and that the amendment "denies any *legal recognition* that 'intends to approximate the design, qualities, significance or effect of marriage' to relationships between unmarried persons." (Appellant's Merit Brief at 3,5 (emphasis in original).) Appellant claims that the domestic violence law unconstitutionally "gives and requires the equivalence of marriage to unmarried persons" by making them eligible for protection or prosecution when they engage in violent conduct toward each other. (Appellant's Merit Brief at 6.) Contrary to appellant's claims, the domestic violence law does not conflict with the plain language of Article XV, Section 11.

A. By its plain language, Article XV, Section 11 prohibits only the creation or recognition of a "legal status," and R.C. 2919.25 does not create or recognize a legal status.

Article XV, Section 11 has a limited reach. In its first sentence, it defines marriage under Ohio law to exclude same-sex couples. Its second sentence limits only the state's creation of certain kinds of "legal status." By its plain language, Article XV, Section 11 goes no further than that. It does not say anything about people who live together or the provision of personal safety protections to them.

The term "legal status" has a specific and limited meaning when used to refer to a personal relationship. "[A] 'status' means a legal personal relationship, not temporary in

its nature nor terminable at the mere will of the parties, with which third persons and the state are concerned.” Restatement (First) Conflict of Laws, Section 119 (1937); *see also Noble v. Noble* (C.P. 1959), 80 Ohio Law Abs. 581, 160 N.E.2d 426, 430 (citing Restatement (First) Conflict of Laws, Section 119). Similarly, the Court of Appeals below pointed to the definition of “status” in Webster’s Third New International Dictionary, holding that for a law to create a legal status it must determine, “the nature of [a person’s] legal personality, his legal capacities, and the nature of the legal relations to the state or to other persons into which he may enter.” *Carswell* at ¶17. Thus, a “legal status” signifies only those personal relationships made effective by law, such as the status of spouse, custodian, or guardian. Restatement (First) Conflict of Laws § 119 (Comment (a)) (1937).²

Legal statuses (such as being a spouse, custodian, guardian, parent, or child) are terminable only by a judicial act or death, *see Solomon v. Solomon* (C.P. 1903), 13 Ohio Dec. 517 (“Marriage originates in the consent of the parties; but it can be legally dissolved, only at the sovereign pleasure”), reversed on other grounds (1904), 16 Ohio C.D. 307; *Kirsheman v. Paulin* (1951), 155 Ohio St. 137, 142-43, 44 O.O. 134, 98 N.E.2d 26 (designated heirs do not have the legal status of a child because a declarant can revoke an heir’s status at will until death, while “once a child, always a child”); *see,*

² Numerous courts in other states have adopted the restrictive definition of “legal status” contained in the Restatement. *See, e.g., In re Marriage of Leonard*, 122 Cal.App.3d 443, 454, 175 Cal.Rptr. 903 (1981) (marriage, child custody, and parent-child relationships are all legal statuses, citing the Restatement), abrogation on other grounds recognized by *McArthur v. Superior Court*, 235 Cal.App.3d 1287 (1991); *In re Dreer’s Estate*, 173 A.2d 102 (Pa. 1961) (concerning the status of adopted child, citing the Restatement); *Beckmann v. Beckmann*, 218 S.W.2d 566, 569 (Mo. 1949) (the custody of minor children constitutes a status, citing the Restatement); *In re Davidson’s Will*, 26 N.W.2d 223, 225 (Minn. 1947).

generally, *Anonymous v. Anonymous*, 85 A.2d 706 (Del. 1951) (marriage is more than a contract; it is a status “defined and established by law”).

Additionally, these statuses, including the status of being married, confer certain rights and obligations on the parties with respect to each other and in relation to third parties. See Restatement (First) Conflict of Laws, Section 119 (Comment (d)) (1937); see, also, e.g., *Hardin v. Davis* (C.P. 1945), 16 Ohio Supp. 19, 30 O.O. 524 (marriage is unlike other contracts in that the state is considered a party and imposes obligations on the spouses whether they want to be bound by them or not); *Malcolm v. Malcolm* (Feb. 18, 1982), Franklin App. Nos. 81AP-367, 81AP-368, 1982 WL 3982 at *1 (distinguishing the “legal status” of spouse from “paramour” both because the latter relationship “may be terminated at any time,” and because paramours are not legally obligated to “do anything” for each other); *Police & Firemen’s Disability & Pension Fund v. Redding*, Franklin App. No. 01AP-1303; 2002-Ohio-3891 at ¶24 (noting that “marriage” “impl[ies] a whole panoply of rights and obligations between the supposed marital partners, as well as in their relation to the world at large”) appeal denied, 97 Ohio St.3d 1484, 2002-Ohio-6866, 7780 N.E.2d 287; see, also, e.g., *In re Marriage of J.T.*, 891 P.2d 729, 731 (Wash. App. 1995) (marriage is a legal status that imposes legal rights, duties, and obligations on spouses).

A person’s legal status also may determine his or her capacity to enter into contracts and other legal relations with other people and the state, see, e.g., *Carswell* at ¶17; *Bonfield*, supra, 97 Ohio St.3d at 392 (noting that Ohio statutes accord the consenting husband of a woman impregnated by artificial insemination with someone else’s sperm the status of father, permitting him to enter into shared parenting

agreements, among other parental rights). Finally, a legal status, such as being married or a legal custodian, generally will be respected and enforced across state lines and in multiple jurisdictions and settings, although the specific incidents of status may vary. *See generally, Chaudry v. Chaudry*, 388 A.2d 1000, 1005 (N.J. App. 1978) (recognizing a Pakistani divorce decree in part because of the “need for predictability and stability in status relationships”); *Estate of Dreer*, 173 A.2d 102, 107 (Pa. 1961) (noting the distinction between the status of adopted child, which is portable, and the incidents of status, such as whether an adopted child may inherit on the same terms as a biological child, which may vary from jurisdiction to jurisdiction); *cf. Cleveland Heights ex rel. Hicks v. Cleveland Heights*, 162 Ohio App.3d 193, 2005-Ohio-3582, 832 N.E.2d 1275 (rejecting arguments that a city’s domestic partner registry created a status for unmarried couples in violation of state public policy in part because “[f]oreign jurisdictions are not bound to acknowledge the Registry or to confer any rights or obligations”).

By including current or recent cohabitants within the statutory definition of a “family or household member” in the domestic violence law, the legislature did not create a legal status, but a factual test. R.C. 2919.25. If a victim is “cohabiting with the offender” at the time of the offense or did within five years prior, she or he is covered by the law, not draped with a legal status. *Id.* It is particularly nonsensical to argue that persons who cohabited years ago were intended by this law to be assigned, long after the fact, a legal relational status that had no other identified significance until one battered the other – at which point it permits the batterer to avoid responsibility.

As the court below noted, the domestic violence law does not confer or take away a bundled set of legal rights and does not determine a person’s legal capacities, meaning

that the domestic violence law has no impact on a person's ability to consent, to make contracts or to have other dealings with third parties or the state. *Carswell* at ¶18. Appellant's claim of a right to commit domestic violence without liability under the law because he never married the victim should be rejected. That a person may be eligible under the domestic violence law for protection or prosecution does not say anything about whether his or her relationship merits legal recognition in any other context, and certainly does not create a permanent relationship that must be dissolved by law in order for the two participants to exit it. *See, also, State v. Rodriguez*, Huron App. No. H-05-020, 2006-Ohio-3378, at ¶32 (domestic violence law does not create a legal status because it does not impose "a host of legal rights and liabilities" on cohabitants); *State v. Edwards*, Stark App. No. 2005CA00129, 2005-Ohio-7064 at ¶¶26-30; *Nixon, supra*, Summit App. No. 22667, 2006-Ohio-72 at ¶13; *Burk, supra*, Cuyahoga App. No. CA-05-086162, 2005-Ohio-6727 at ¶¶24-31 (the term "cohabitant" in the domestic violence law is "not a legal status, let alone a status that 'intends to approximate the design, qualities, significance or effect of marriage'"); *Cleveland v. Voies*, Cuyahoga App. No. 86317, 2006-Ohio-815 (same); *State v. Douglas*, Cuyahoga App. Nos. 86567, 86568, 2006-Ohio-2343 (same); *State v. Rodgers*, 131 Ohio Misc.2d 1, 2005-Ohio-1730, 827 N.E.2d 872, affirmed, __N.E.2d __, 2006-Ohio-1528.

This Court has been careful not to confuse according limited protections that are associated with marriage with according the legal status of marriage itself. For example, in *Bicknell, supra*, 96 Ohio St.3d 76, a lesbian couple petitioned to change their names to a common surname in order to demonstrate commitment and to indicate that they and their future child were a family. Because a shared last name is often taken on marriage,

the trial court refused to grant the petition: “[To grant the petition] would be to give an aura of propriety and official sanction to their cohabitation and would undermine the public policy of this state which promotes legal marriages and withholds official sanction from non-marital cohabitation.” *Id.* at 76.

This Court reversed, finding that merely granting an unmarried couple the benefit of the state’s name change statute does not require a court to “validate a same sex union,” and does not constitute “state endorsement of nonmarital cohabitation.” *Id.* “Any discussion, then, on the sanctity of marriage, the well-being of society, or the state’s endorsement of nonmarital cohabitation is wholly inappropriate and without any basis in law or fact.” *Id.* at 78. Thus, *Bicknell* illustrates the distinction between providing benefits to unmarried persons that also may come with marriage, and assigning the legal status itself. *See, also*, Restatement (First) Conflict of Laws § 119 (Comment (a)) (legal incidents of status are distinct from the relationship itself); *Kirsheman*, *supra*, 155 Ohio St. 137 at 142-43 (that someone may be designated an heir does not grant them the legal status of child); *In re Davidson’s Will*, *supra*, 26 N.W.2d at 225 (“Confusion results from a failure to observe the fundamental distinction between Status and the rights which arise thereunder”).

Appellant argues that the domestic violence law violates Article XV, Section 11 because it provides “recognition” to unmarried people, and that “unmarried persons can’t be given the benefits afforded to married persons” (Appellant’s Merit Brief at 3, 7, 8); *see, also*, *State v. Ward*, 166 Ohio App.3d 188, 2006-Ohio-1407 at ¶¶24-35 (domestic violence law is unconstitutional because it grants a spousal benefit to a “quasi-marital relationship”); *State v. Woullard*, Greene App. No. 2005 CA 61, 2006-Ohio-1804 (citing

Ward); *State v. Peterson*, Greene App. No. 2005 CA 44, 2006-Ohio-1816 (same); *State v. Steineman*, Greene App. No. 2005 CA 46, 2006-Ohio-1818 (same); *State v. Dixon*, Greene App. No. 2005 CA 47, 2006-Ohio-1584 (same); *State v. Phillips*, Montgomery App. No. 21128, 2006-Ohio-1607 (same); *State v. McIntosh*, Montgomery App. No. 21093, 2006-Ohio-1815 (same); *State v. Maddox*, Montgomery App. No. 2113, 2006-Ohio-2127 (same). This view broadens Section 11 far beyond its plain language and what the voters approved. Nor can it be assumed that people wanting to limit access to marriage oppose alternative means of providing rights and protections to unmarried persons.

Article XV, Section 11 does not prohibit recognition of non-marital *relationships* or according benefits to unmarried persons, let alone acknowledging as a factual matter that two unmarried people who are cohabiting may need domestic violence protection as married persons do. It prohibits only recognition of a “*legal status* for relationships of unmarried individuals.” Article XV, Section 11. Cohabitation is an act, not a legal status. See *Yaeger v. Yaeger*, Geauga App. No. 2002-G-2453, 2004-Ohio-1959, at ¶30 (in proceedings to terminate spousal support, court declined to find that an unmarried cohabitant had “assume[ed] a status similar to marriage” even though the cohabitants had a sexual relationship and shared expenses and a joint checking account, because “[t]here was no evidence that [the unmarried cohabitant] took upon herself a legal character or condition similar to remarriage”); *Lauper v. Harold* (1985), 23 Ohio App.3d 168, 170, 23 O.B.R. 411, 492 N.E.2d 472 (declining to “recognize a new legal status” for cohabitants). Indeed, while a cohabiting relationship may resemble a marital relationship in some respects (the parties may live together, share bank accounts, divide household chores,

and/or sleep in the same bed), the distinction between a cohabitant and a spouse is the *lack* of a legal status that has been created and is recognized by the State.³

Appellant's interpretation of Article XV, Section 11 would render the term "legal status" superfluous, improperly reading it out of the amendment. Ohio courts apply the same rules of construction when interpreting constitutional amendments as they do when interpreting Ohio statutes. *State v. Jackson* (2004), 102 Ohio St.3d 380, 811 N.E.2d 68, 2004-Ohio-3206, at ¶12. Under Appellant's interpretation, Article XV, Section 11 would have the same effect as if the phrase "a legal status for" were not part of the amendment and it prohibited recognition of *relationships* of unmarried individuals. Such an interpretation is inappropriate, as "it is the duty of the court to give effect to the words used." *Cassels v. Dayton City School District Board of Education*, 69 Ohio St.3d 217, 220, 1994-Ohio-92, 631 N.E.2d 150; *Bryan v. Hudson* (1997), 77 Ohio St.3d 376, 674 N.E.2d 678 (a court must give effect to all words of a provision).

³ The Third District Court of Appeals erred in holding that cohabitation is a legal status by pointing to definitions of cohabitation in cases concerning termination of spousal support and common law marriage, and suggesting that "cohabitation" therefore involves bundled rights, obligations and liabilities. *State v. McKinley*, Logan App. No. 8-05-14, 2006-Ohio-2507 (while domestic violence law did not *create* a legal status, it *recognized* one). The court improperly conflated unrelated legal principles and situational rather than static definitions. The definition of "cohabitant" triggering termination of spousal support obligations is different from the definitions of "cohabitant" as an element of a common law marriage, and from the definition under the domestic violence law. *Compare State v. Williams* (1997), 79 Ohio St.3d 459, 465, 683 N.E.2d 1126 ("cohabitation" under the domestic violence law requires sharing of familial or financial responsibilities and consortium, but does not necessarily involve one partner's financial support of the other) with *In re Marriage of Briggs* (1998), 129 Ohio App.3d 346, 349-51, 717 N.E.2d 1110 (financial support essential to a showing of cohabitation terminating spousal support obligations), *Bowman v. Senne* (1995), Summit App. No. 17013, 1995 WL 312713 at *3 (for purpose of showing a common law marriage, cohabitation means living as husband and wife, with mutual assumption of marital rights, obligations and duties) (unreported and attached). A criminal court's

Amicus curiae Citizens for Community Values (“CCV”) concedes that Article XV, Section 11 permits extending state benefits to unmarried people that also are provided to married people as long as the State does not acknowledge expressly that it is doing so, but CCV nonetheless claims that the domestic violence law violates Article XV, Section 11 because it uses the phrase “living as a spouse.”⁴ Brief *Amicus Curiae* of

determination that a defendant or a victim is a “cohabitant” under the domestic violence law says nothing about whether either would be a “cohabitant” in any other context.

⁴ CCV admits that the legislature may remedy the domestic violence law’s supposed unconstitutionality by defining “household members” more broadly to include anyone who shares a home, such as roommates, dorm-mates, and live-in nannies. CCV incorrectly claims that 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.” Brief *Amicus Curiae* of CCV at 10; *see, also, Ward, supra*, 166 Ohio App.3d 188, 2006-Ohio-1407 at ¶34-35. To the contrary, people are uniquely vulnerable to abuse by their intimate partners, and violence between people in dating or spousal relationships presents unique challenges requiring specific treatment under criminal law.

For example, “Violence against women is *primarily* intimate partner violence: 64.0 percent of the women who reported being raped, physically assaulted, and/or stalked since age 18 were victimized by a current or former husband, cohabiting partner, boyfriend, or date.” Tjaden, Patricia, & Thoennes, Nancy, *Full Report on the Prevalence, Incidence, and Consequences of Violence Against Women*, Publication No. NCJ83781, U.S. Department of Justice, National Institute of Justice, and Centers for Disease Control and Prevention, at iv, 46 (July 2000), available at <http://www.ncjrs.gov/pdffiles1/nij/183781.pdf> (last visited Jul. 9, 2006) (emphasis added). “Of the women who reported being raped and/or physically assaulted since age 18, three quarters (76%) were victimized by a current or former husband, cohabiting partner, boyfriend, or date.” *Id.* at 61.

Additionally, most male and female victims of domestic violence are victimized more than once. *Id.* at 26-27 (female victims of assault at the hands of an intimate partner averaged 3.4 physical assaults over the course of a year, and male victims averaged 3.5 assaults); *see, also, Tjaden, Patricia & Thoennes, Nancy, Extent, Nature, and Consequences of Intimate Partner Violence*, Publication No. NCJ181867, U.S. Department of Justice, National Institute of Justice, and Centers for Disease Control and Prevention, at 39 (July 2000), available at <http://www.ncjrs.gov/pdffiles1/nij/181867.pdf> (last visited Jul. 9, 2006) (reporting that overall, female domestic violence assault victims reported an average of 6.9 assaults by the same partner, and male victims reported an average of 4.4 assaults by the same partner). Women also are more likely to suffer injury as a result of a violent crime, including rape, if it is perpetrated by an intimate partner.

CCV at 9, 10. According to CCV, the amendment prohibits a law from referring expressly to the fact of a romantic relationship between people who are not married to each other. Brief *Amicus Curiae* of CCV at 6, 9 (a relationship “is exalted to ‘legal status’ upon its recognition and definition in a legislative enactment which makes that relationship relevant to operation of state laws”). Again, CCV’s interpretation would render the term “legal status” superfluous, improperly reading it out of the amendment.⁵

See id. at 52; *see, also*, Simon, Thomas & Mercy, James, *Injuries from Violent Crime 1992-1998*, Publication No. NCJ168633, U.S. Department of Justice, National Institute of Justice, and Centers for Disease Control and Prevention, at 7-8 (June 2001), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ivc98.pdf> (last visited Jul. 9, 2006) (female victims of intimate partner violence are more likely to be injured than female victims of a “known non-intimate” or a stranger; those victimized by a friend, acquaintance or stranger are least likely to be injured).

Intimate partner violence also presents unique challenges to prosecutors as a result of victims’ frequent emotional and economic dependence on their abusers. “Many victims of domestic violence recant their testimony on the witness stand or seek to minimize the effect of domestic violence on themselves or others.” 57 A.L.R.5th 315 (1998). “The behavior of victims of domestic abuse which may affect prosecution of the batterer includes the victim’s withdrawal of the complaint, refusal to testify, denial or minimization of injuries incurred as a result of the violence, recantation of testimony, confusion, loss of memory of details, identification with the aggressor, fear and anxiety, and similar conduct.” *Id.* at § 2(a); *see, also, generally*, R.C. 2901.06 (A) (1) (recognizing that “battered woman syndrome” “is a matter of commonly accepted scientific knowledge). These obstacles to successful prosecution derive from the intimate nature of the relationship between perpetrator and victim, and are not equally true of violent crimes by a stranger, acquaintance, or friend. “[T]he offense of domestic violence arises out of the relationship itself, not the fact that the parties happen to share one address.” *Williams, supra*, 79 Ohio St.3d at 465.

⁵ As an argument in the alternative, CCV counters the Court of Appeals’ citation of the dictionary definition of “status” by excerpting Webster’s Dictionary, arguing that the law “establish[es] the nature of the legal relations between . . . two cohabitants” simply by permitting “application of the domestic violence laws,” and “classif[ying] a cohabitant as one of many potential victims.” Brief *Amicus Curiae* of CCV at 7. This is a misrepresentation of Webster’s definition. Cohabitants do not enter into “legal relations” with each other simply by virtue of an assault. According to the dictionary definition as a whole, a law must circumscribe “the nature of [a person’s] legal personality, his legal capacities, and the nature of the legal relations to the state or to other persons into which he may enter,” in order to create a “status.” Webster’s Third New International

“Cohabitant” and “living as a spouse” are merely descriptive, shorthand phrases in Ohio’s domestic violence law that trigger an understanding that the statute applies to the sort of dating relationships likely to involve shared living space, entangled finances, sexual relations, emotional ties, and other features that can combine to make someone uniquely vulnerable to domestic abuse. Because R.C. 2919.25 does not create or recognize a legal status, the Court of Appeals correctly concluded that the state’s domestic violence law cannot be found to conflict with Article XV, Section 11.

B. Even if Ohio’s domestic violence law could be construed as creating or recognizing a legal status, it does not create or recognize a legal status that “intends to approximate the design, qualities, significance, or effect of marriage.”

In order for Article XV, Section 11 to invalidate it, a statute must not only create or recognize a legal status, but that legal status must “intend to approximate the design, qualities, significance or effect of marriage.” As an independent basis for its ruling, the Court of Appeals correctly held that even if the domestic violence law could be construed as creating or recognizing a legal status, the statute nevertheless would remain constitutional because it “does not ‘intend[] to approximate the design, qualities, significance, or effect of marriage.’” *Carswell* at ¶19.

Dictionary (2002), at 2230. In contrast, the domestic violence law says nothing about whether a relationship between a perpetrator of domestic abuse and a victim will be recognized in any other context, and says nothing about the participants’ legal capacities to consent or enter into other relations with anyone. All it does is establish one possible factual predicate for criminal prosecution and provide enhanced penalties for certain criminal behavior.

CCV also offers a hypothetical about domestic partnership, arguing that a statute giving benefits or protections to domestic partners would create a legal status as well. Brief *Amicus Curiae* of CCV at 6, 9. Not only is this unsupported assumption wrong, the validity of domestic partner relationships or benefits is not at issue in this case and it

The purpose of the Ohio domestic violence statute is to address a problem that is independent of marital status: violence between people in intimate or family relationships. Unmarried cohabitants enjoy protection, along with cohabiting spouses, parents, children, grandparents, aunts and uncles, former spouses, and former cohabitants. R.C. 2919.25 (F) (1) (a). By contrast, a spouse who has never resided with the offender is *not* protected. *Id.* Marriage is irrelevant to the law, as not all married people are protected, and some unmarried people also are protected.

For a legal status to intend to approximate the “design,” “qualities,” “significance,” or “effect” of marriage, it must do substantially more than provide limited protection in one arena. Marriage is society’s most significant public proclamation of and legal shelter for the lifetime commitment of one person to another. The effect of marriage legally is to provide instant access to an extensive legal structure that protects a couple’s relationship and supports the family and any children by assigning myriad rights and responsibilities. It is unparalleled in its recognized meaning and expressive power, and communicates instantly a couple’s commitment and the legal sanction and respect accorded their relationship. In many ways, the law treats a married couple as a financial and legal unit.

Just a few of the state-granted benefits that automatically accompany marriage include: making medical decisions for an incapacitated spouse (R.C. 2133.08 (B), R.C. 5122.271(D)); enjoying presumptions of parenthood when a spouse gives birth (R.C. 3111.03); and accessing various protections designed to increase a family’s economic security, such as rights associated with real estate ownership (*see, e.g.*, R.C. 1313.29),

would be inappropriate to reach those issues here. *See, e.g., Brinkman v. Miami*

taxation (R.C. 5711.14, R.C. 5747.025, R.C. 5747.05, R.C. 5747.08), tuition benefits (R.C. 3333.31, R.C. 3345.09), mortgage-related protections (R.C. 4112.02 (H) (6)), retirement benefits (*see, e.g.*, R.C. 145.325), unemployment benefits (R.C. 4141.30 (E) (2)), division of property in the event of divorce (R.C. 5302.20), spousal support obligations (R.C. 3103.03, R.C. 3105.18), survivorship benefits (*see, e.g.*, R.C. 146.12, R.C. 742.26, R.C. 742.37), and the automatic right to inherit in the absence of a will (R.C. 2105.06). Further, in addition to the legal rights and benefits accorded by Ohio statutes, many private parties rely on the State's conferral of marriage and definition of "spouse" in deciding to whom to provide benefits such as health insurance, bereavement leave, joint auto or rental insurance, and family memberships in businesses such as health clubs.

As the Court of Appeals noted, the legal status of marriage is exceptional and is not remotely approached by the protections accorded unmarried cohabitants under the domestic violence law. *Carswell*, at ¶19 (because the statute does not permit unmarried individuals to enter into a legally binding, marriage-like relationship with each other, and does not provide rights such as the ability "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 host of rights associated with marriage," it does not intend to approximate the design, qualities, significance, or effect of marriage); *see, also, Police & Firemen's Disability & Pension Fund v. Redding, supra*, 2002-Ohio-3891 at ¶¶24, 26 (marriage "impl[ies] a whole panoply of rights and obligations between the

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supposed marital partners, as well as in their relation to the world at large” and noting “the enormous significance and import of the institution of marriage”).⁶

A law prohibiting violence between unmarried people does not accord a panoply of rights, benefits and obligations to the couple, does not grant legal sanction to a relationship, and does not confer societal recognition and approval, all of which are hallmarks of civil marriage.⁷ Accordingly, nothing in the domestic violence law, which

⁶ CCV mischaracterizes the domestic violence law as requiring a *relationship* to intend to approximate marriage in order for the parties to qualify as cohabitants. Brief *Amicus Curiae* of CCV at 8. The word “intends” in Article XV, Section 11, relates to what the “legal status” intends, and not to what a couple involved in a relationship intends. The amendment prohibits creation or recognition of a “*legal status* for relationships of unmarried individuals *that intends* to approximate . . . marriage.” The word “relationships” is plural, and therefore “that intends” can refer only to “legal status,” which is singular. Therefore, it is irrelevant whether an unmarried couple is trying to have their relationship mimic a married couple’s.

⁷ If a court were to recognize a common law marriage, or the Ohio legislature were to pass a measure granting certain couples comprehensive state rights associated with marriage such as happens with a “civil union” in Vermont (*see* Vt. Stat. Ann. tit. 15, ch. 23, §§ 1201-07) or Connecticut (An Act Concerning Civil Unions, 2005 Conn. Pub. Acts 10 (effective Oct. 1, 2005)), or with a registered “domestic partnership” in California (Cal. Fam. Code § 297 (West 2005)), any of these might qualify as a “legal status.” A civil union, or a California registered domestic partnership, for example, is terminable only by law, imposes obligations on the members of the couple to each other and to third parties, and provides a broad range of benefits and protections. However, even that would not conclude the analysis of whether such measures would be constitutional under Article XV, Section 11. To determine their constitutionality (a question not before the Court at this time), a court still would have to determine whether any legal status intends to approximate the design, qualities, significance or effect of marriage. “Civil unions” and “domestic partnerships” vary in scope, have uncertain validity outside of their state of origin and do not entitle couples to the more than 1300 federal rights and benefits associated with marriage. *See* “Defense of Marriage Act,” Pub. L. 104-199, sec 1, 100 Stat. 2419 (Sep. 21, 1996), codified at 1 U.S.C. § 7 (1997); Pub. L. 104-199, sec. 2, 100 Stat. 2419 (Sep. 21, 1996), codified at 28 U.S.C. § 1738C (1997) (limiting federal recognition to different sex marriages); U.S. General Accounting Office, *Defense of Marriage Act: Update to Prior Report*, GAO/O4-353R (Wash. D.C.: Jan. 23, 2004) (“GAO Report”) (App. C-1 - C-18); *see Rosengarten v. Downes* (2002), 71 Conn. App. 372, 802 A.2d 170 (declining to exercise jurisdiction over a dissolution of a Vermont civil union). *See, also, Knight v. Schwarzenegger* (2005), 128 Cal. App.4th 14, 26 Cal.

is a *criminal* statute, and not a vehicle for providing a structure of bundled rights and societal approval to relationships, intends to approximate the design, qualities, significance or effect of marriage, and the Court of Appeals' judgment should be affirmed.

C. Even if Article XV, Section 11 and the domestic violence law were capable of more than one construction, the Court is required to select the interpretation of both that upholds the domestic violence law's validity.

The Court of Appeals correctly concluded that a reasonable interpretation of both Article XV, Section 11 and the domestic violence law exists in which the two provisions are compatible and the statute is constitutional. Where the plain language of an amendment is clear, it is given effect without inquiring into the alleged intent of its drafters or of Ohio voters. *Cleveland Trust Co. v. Eaton* (1970), 21 Ohio St.2d 129, 138, 256 N.E.2d 198. Implicit repeal of a statute by a new constitutional amendment is disfavored and is uncalled for here. *Hupp v. Hock-Hocking Oil & Natural Gas Co.* (1913), 88 Ohio St. 61, 70, 101 N.E. 1053; *see also* 16 Ohio Jurisprudence 3d (2001), *Constitutional Law* §§ 44-45 (repeal by implication occurs only if "inconsistency between existing legislation and a new constitutional provision [is] direct, necessary, irreconcilable, and incapable of fair reconciliation").

Article XV, Section 11 and Ohio's domestic violence statute are easily reconciled by giving full effect to each provision's plain language. *Jackson, supra*, 102 Ohio St.3d at 382 (plain meaning must be given its full effect). "It is also a well-settled principle of statutory construction that where constitutional questions are raised, courts will liberally

Rptr.3d 687 (concluding that adoption of California's comprehensive domestic partnership law did not violate state initiative providing that only a marriage between a man and a woman is valid or recognized in that state).

construe a statute to save it from constitutional infirmities.” *State v. Sinito* (1975), 43 Ohio St.2d 98, 101, 72 O.O.2d 54, 330 N.E.2d 896. The plain language of “legal status” and of the final clause of the amendment should and can very reasonably be read as *Amicus* suggests above and this reading reconciles the amendment with the domestic violence statute, leaving both in place. *See, e.g., Carswell, supra*, at ¶21.⁸ Even if a viable alternative interpretation were offered, “where a court is faced with two possible interpretations of a statute or ordinance, one which would render it constitutional and the other unconstitutional, it is the *duty* of the court to choose that interpretation which would uphold its validity.” *State v. Meyer* (1983), 14 Ohio App.3d 69, 71-72, 470 N.E.2d 156 (emphasis added). Here, the Court of Appeals correctly interpreted the statute to fall outside the amendment’s reach.

⁸ Other appellate courts that have found no conflict between the domestic violence law and Article XV, Section 11, include *State v. Rodriguez*, Huron App. No. H-05-020, 2006-Ohio-3378, at ¶32 (domestic violence law does not create a legal status that intends to approximate marriage because it does not impose “a host of legal rights and liabilities” on cohabitants); *State v. Goshorn*, Ross App. No. 05CA2879, 2006-Ohio-2755 at ¶7 (no legal status that intends to approximate marriage); *State v. Adams*, Stark App. No. 2005CA00103, 2005-Ohio-6333, at ¶¶25-28 (Article XV, Section 11 “has no application to criminal statutes in general or the domestic violence statute in particular”); *State v. Newell*, Stark App. No. 2004CA00264, 2005-Ohio-2848 at ¶¶26-45 (same); *State v. Brown*, 166 Ohio App.3d 32, 2006-Ohio-1181, at ¶21 (does not intend to approximate marriage); *State v. Edwards*, Stark App. No. 2005CA00129, 2005-Ohio-7064 at ¶¶26-30 (no legal status created); *State v. Nixon*, Summit App. No. 22667, 2006-Ohio-72 at ¶¶15-17 (no legal status); *State v. Burk*, Cuyahoga App. No. 86162, 2005-Ohio-6727 at ¶¶30-32 (no legal status); *Cleveland v. Voies*, Cuyahoga App. No. 86317, 2006-Ohio-815 (same); *State v. Douglas*, Cuyahoga App. Nos. 86567, 86568, 2006-Ohio-2343 (same); *State v. Bryant*, Butler App. Nos. CA2005-02-025, CA2005-04-086, 2005-Ohio-6855 at ¶10; *Uhrichsville v. Losey*, Tuscarawas App. No. 2005 AP 03 0028, 2005-Ohio-6564 at ¶¶32-33; *State v. Rodgers*, ___ N.E.2d ___, 2006-Ohio-1528 at ¶¶15, 16 (no legal status, and does not intend to approximate marriage).

CONCLUSION

For all of the foregoing reasons, this Court should affirm the Court of Appeals' decision denying appellant's motion to dismiss.

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**Motion for admission *pro hac vice* pending

PROOF OF SERVICE

Pursuant to Supreme Court Rule 14, I certify that on July ___, 2006, I caused a copy of the foregoing Brief of *Amicus Curiae* Lambda Legal Defense and Education Fund, Inc. to be served upon the following counsel of record by United States mail, first-class postage prepaid:

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