COURT OF APPEALS
TWELFTH JUDICIAL DISTRICT
WARREN COUNTY, OHIO

STATE OF OHIO,	:	
Appellant,	:	Case No.: CA2005-04-047
vs.	:	
MICHAEL S. CARSWELL,	:	
Appellee	:	

BRIEF OF AMICUS CURIAE
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.

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**motion for leave to appear *pro hac vice* pending

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Authorities:

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 seeks to assist this Court in its interpretation and application of Ohio's recently-enacted constitutional amendment, Article XV, Section 11 of the Ohio Constitution. Lambda Legal has represented parties or appeared as *amicus curiae* in similar cases, including current challenges to anti-gay amendments in Nebraska and Georgia. *See Citizens for Equal Protection, Inc. v. Bruning* (May 12, 2005), D. Neb. No. 4:03CV3155, 2005 WL 11268 (not yet published in F. Supp.) (striking down Nebraska's amendment) Appendix ("App.") 4-46; *O'Kelley et al. v. Perdue*, Fulton County Super. Ct. No. 2004 CV93494 (Filed Nov. 9, 2004) (awaiting summary judgment decision). Lambda Legal has appeared previously before this Court and in several other Ohio cases including *In re J.D.M.* (Oct. 11, 2004), Warren App. Nos. CA2003-11-113, CA2004-04-035, CA2004-04-040, 2004 WL 2272063, unreported, App. 47-51, and *In re Bicknell* (2002), 96 Ohio St.3d 76, 771 N.E.2d 846. Because of its interests and unique expertise, Lambda Legal respectfully requests leave to file this brief *amicus curiae* to assist the Court in proper resolution of this appeal.

SUMMARY OF ARGUMENT

In the November, 2004, general election, voters passed "Issue 1," an amendment to the Ohio Constitution that was promoted as necessary to defend the institution of marriage against gay and lesbian couples. Citing this recent amendment, now titled Article XV, Section 11, the trial court reduced a felony charge of domestic violence to misdemeanor assault because the defendant is not married to the woman with whom he lives and whom he allegedly assaulted. Referring to the second sentence of Article XV, Section 11, the court reasoned that applying Ohio's domestic violence statute, R.C. § 2919.25, to unmarried cohabitants confers a "marital-type" status in violation of the newly-enacted amendment.

Properly construed, Article XV, Section 11 has no impact on Ohio's domestic violence laws. Ohio courts apply the same rules of construction when interpreting constitutional amendments as they do when interpreting Ohio statutes. 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. Article XV, Section 11's second sentence applies only if a "legal status" is created or recognized by law. The domestic violence statute does neither. Further, even if it did, any legal status created by that statute does not "intend" to "approximate" marriage.

The purpose of the domestic violence law is to protect Ohioans from abuse in their own homes, including at the hands of loved ones. R.C. § 2919.25 makes all people, married or not, subject to the protections and possible punishments of Ohio's domestic violence law. But the statute does not confer any legal status on an unmarried cohabiting couple, nor does it do anything that intends to approximate the vast array of rights and

obligations that civil marriage confers on married partners with respect to each other and in relation to the world at large.

Amicus strongly believes that Article XV, Section 11 is unconstitutional, but the Court need not reach any constitutional issues to resolve this case because Article XV, Section 11 properly cannot be read to leave unmarried individuals outside the protections from violence in R.C. § 2919.25.[1]

ARGUMENT

THE TRIAL COURT ERRED AS A MATTER OF LAW BY FAILING TO ADOPT A REASONABLE INTERPRETATION OF ARTICLE XV, SECTION 11 AND R.C. § 2919.25 THAT RECONCILES THEM BOTH; THE PLAIN LANGUAGE AND MEANING OF THE TWO PROVISIONS ARE COMPATIBLE

Nothing in the Ohio Constitution permits batterers to avoid appropriate punishment, or leaves unmarried victims, including gay and lesbian victims, without a remedy they have long had. This Court should determine that Article XV, Section 11 has no effect on the protections 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 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.*

The trial court wrongly held that Ohio's domestic violence law violates the second sentence of Article XV, Section 11 by protecting unmarried cohabitants from domestic

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[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), 116 S.Ct. 1620, 517 U.S. 620; *Citizens for Equal Protection, Inc. v. Bruning* (May 12, 2005) D. Neb. No. 4:03CV3155, 2005 WL 1126834 (not yet reported in F. Supp.) App. 4-46; *State ex rel. Clarke v. Cook* (1921), 103 Ohio St. 465, 134 N.E. 655 (a court should avoid reaching constitutional issues unless absolutely necessary).

abuse.[2] The court reasoned that "cohabiting is a relationship that in all respects approximates the significance or effect of marriage." (Decision and Order at 2-3, citing *State of Ohio v. Frederick Burk* (Mar. 23, 2005), Cuyahoga County C.P. No, 462510, 2005 WL 786212, unreported, App. 52-60, appeal pending, Cuyahoga App. No. CA-05-086162.)

The trial court failed to give effect to the plain language of Article XV, Section 11. The domestic violence law does not conflict with that language. Because this case is resolved fully by resort to the plain language of the amendment and statute, this Court need not proceed to further analysis of what Ohio voters intended in adopting Article XV, Section 11 or the amendment's constitutionality.[3] *See, e.g., State ex rel. Burrows v. Indus. Comm.* (1997), 78 Ohio St.3d 78, 81, 676 N.E.2d 519, 521 (if the language of a constitutional amendment is clear, a court may not look beyond it). Additionally, 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 the statute's validity unless there is *no interpretation possible that makes it compatible with a constitutional provision. See In Re Protest of Brooks* (2003), 155 Ohio App.3d 370, 374-75, 801 N.E.2d 503, 506-07.

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[2] Ohio's domestic violence law makes it a crime for anyone to threaten, harm, or attempt to harm a "family or household member," and define a "family or household member" as including a "person living as a spouse."[2] 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). Thus, the statute targets violence against cohabitants as well as spouses.

[3] Thus, in construing the impact of Article XV, Section 11 on Ohio's domestic violence law, the Court need not determine voters' intent in adopting Article XV, Section 11, which was advertised and advocated to Ohioans through blatant appeal to anti-gay animus.

1. By its plain language, Article XV, Section 11 prohibits only creation or recognition of a "legal status," and the domestic violence law does not create a legal status

Article XV, Section 11 has a limited reach. In its first sentence, it defines marriage to exclude same-sex couples. Its second sentence relates only to the state's creation of a "legal status." By its plain language, Article XV, Section 11 goes no further than that. It does not say anything about domestic violence statutes or other individual benefits and protections currently enjoyed by both unmarried and married individuals.

The term "legal status" has a specific and limited meaning when used to refer to a personal relationship. *See, e.g.,* Restatement (First) of Conflict of Laws, § 119 (1937). "[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." *See also Noble v. Noble* (1959), 80 Ohio Law Abs. 51, 160 N.E.2d 426, 430 (citing Restatement (First) of Conflict of Laws, § 119). It 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).

Consistent with the Restatement, these legal statuses are terminable only by a judicial act or death, s*ee Solomon v. Solomon* (1903), 13 Ohio Dec. 517, 1903 WL 1093 at *4 ("Marriage originates in the consent of the parties; but it can be legally dissolved, only at the sovereign pleasure"), rev'd on other grounds, 16 Ohio C.D. 307, 1904 WL 1146; *Kirsheman v. Paulin* (1951), 155 Ohio St. 137, 142-43, 98 N.E.2d 26, 29-30 (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"), and confer certain rights and obligations on the parties vis-à-vis each other and in relation to third parties.

See Restatement (First) Conflict of Laws § 119 (Comment (d)) (1937); s*ee, also, e.g.*, *Hardin v. Davis* (1945), 16 Ohio Supp. 19, 1945 WL 5519 at *3 (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, unreported, (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) App. 61-65; *Police and Firemen's Disability and Pension Fund v. Redding* (Aug. 1, 2002), Franklin App. No. 01AP-1303, 2002 WL 1767362 at *3-4, unreported, app. denied 97 Ohio St 3d 1484 (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") App. 66-70. Additionally, a legal status like marriage or custody will be respected and enforced across state lines and in multiple jurisdictions and settings. *See, e.g., City of Cleveland Heights ex rel. Jimmie Hicks, Jr. v. City of Cleveland Heights* (May 28, 2004), Cuyahoga County C.P. No. 4522627, unreported, (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") App. 71-75, appeal pending, Cuyahoga App. No. CA-04-084884.

By including cohabitants within the definition of a "person living as a spouse," the legislature did not create a legal status. R.C. § 2919.25 simply identifies and protects equally all persons, regardless of the composition of their household, against domestic violence. When an unmarried person enjoys a benefit or protection that is also common

to married people, it does not make the person married, and courts are careful not to confuse protections that sometimes are associated with marriage with 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 were a family. Because a shared last name is often a hallmark of 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.

The Ohio Supreme Court reversed, finding that 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.*; s*ee, also, 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); *see, also*, Restatement (First) Conflict of Laws § 119 (Comment (a)) (legal incidents of status are distinct from the relationship itself). Similarly, protecting unmarried cohabitants under Ohio's domestic violence law does not create or recognize a legal status, and certainly not one that is akin to marriage.

The trial court below relied on the opinion of the Cuyahoga County Common Pleas Court in *State of Ohio v. Frederick Burk* (Mar. 23, 2005), Cuyahoga County C.P. No. 4625100 (Friedman, J.) at 6, App. 56, which invalidated the domestic violence law

after interpreting its use of "cohabiting" to mean "a *relationship* that in all essential respects approximates the significance or effect of marriage." (Decision and Order at 2-3 (emphasis added) App. 2-3.) However, while the trial court below and in Cuyahoga County indicated that they were relying on Article XV, Section 11's plain language, in fact their analyses gloss over the key term "legal status." Article XV, Section 11 does not prohibit recognition of *relationships* for all purposes. 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. To "cohabit" is "to live together in a sexual relationship, *especially when not legally married*." (The American Heritage Dictionary (4th ed. 2000).) Thus, while a cohabiting relationship may resemble a marital relationship in some respects – the parties may live together, sleep in the same bed, share bank accounts, and divide household chores – cohabiting is not a "legal status" created or recognized by law. *See* R.C. § 3105.12 (repealing common law marriage in 1991); *Lauper v. Harold* (1985), 23 Ohio App.3d 168, 170, 492 N.E.2d 472 (declining to "recognize a new legal status" for cohabitants). Indeed, the distinction between a cohabitant and a spouse is the *lack* of a *legal* status – namely, marriage – that has been created and is recognized by the State.

The trial court's substitution of the term "relationship" for the actual language used in Article XV, Section 11 was improper and yielded a faulty result. *See, e.g.*, *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). "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 all of the other features that can combine to make someone uniquely vulnerable to domestic abuse.

2. Even if Ohio's domestic violence could be construed as creating a legal status, it did not create 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 prohibited legal status must "intend to approximate the design, qualities, significance or effect of marriage." Setting aside for the moment that the domestic violence statute does not create a legal status, it certainly does not intend to recognize or create one that approximates anything akin to civil marriage. [4]

The purpose of the statute is to address violence between people living together, not just violence between people *married* to each other. Unmarried cohabitants enjoy protection, as do parents, children, grandparents, aunts and uncles, and ex-spouses. R.C. § 2919.25 (F) (1) (a). A spouse who has never resided with the offender is not protected.

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[4] For example, if the Ohio legislature were to pass a measure granting certain couples extensive state rights often associated with marriage such as a "civil union" in Vermont (*see* Vt. Stat. Ann. tit. 15, ch. 23, §§ 1201-07) or Connecticut (S.B. 963, Public Act No. 05-10 (effective Oct. 1, 2005)), or a registered "domestic partnership" in California (Cal. Fam. Code § 297 (West 2005)), this might qualify as a "legal status," since a civil union or a California registered domestic partnership 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, that does not conclude an analysis of whether these would be constitutional under Article XV, Section 11. To determine their constitutionality (a question not before the Court at this time), a court would still have to determine whether the civil union or registered Domestic Partnership intends to approximate the design, qualities, significance or effect of marriage. Because the words "civil union" and "domestic partnership" convey less expressive power and confer less societal recognition, and because these legal statuses have uncertain validity outside of their state of origin and do not entitle couples to the more than a thousand federal rights and benefits associated with marriage, a court well could conclude that they remain constitutional under Article XV, Section 11. *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. Gen. Accounting Office, *Defense of Marriage Act: Update to Prior Report*, GAO/O4-353R (Wash. D.C.: Jan. 23, 2004) App. 76-93; *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). S*ee, also, Knight v. Schwarzenegger* (2005), 128 Cal. App.4th 14, 26 Cal. 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).

Id. Marital status thus 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 commitment to another person for life. It is unparalleled in its expressive power, and it communicates instantly a couple's commitment and the legal sanction and respect accorded their relationship. The effect of marriage legally is to provide instant access to an extensive legal structure. It is designed to protect a couple's relationship, and to help to support the family and its children through myriad rights and responsibilities. In many arenas, the law treats a married couple as a financial and legal unit.

In addition to well over a thousand federal benefits (*see* U.S. Gen. Accounting Office, *Defense of Marriage Act: Update to Prior Report,* GAO/O4-353R (Wash. D.C.: Jan. 23, 2004) App. 76-93), 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)); 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), taxation (R.C. §§§ 5711.14, 5747.025, 5747.05, 5747.08), division of property in the event of divorce (R.C. § 5302.20), spousal support obligations (R.C. §§ 3103.03, 3105.18), and the automatic right to inherit in the absence of a will (R.C. § 2105.06). Furthermore, 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 whom to provide benefits such as health insurance, bereavement leave, joint auto or rental insurance, and family memberships in businesses such as health clubs.

Simply put, the legal status of marriage is exceptional and not remotely approached by the domestic violence law. *See, e.g., Police and Firemen's Disability and Pension Fund v. Redding* (Aug. 1, 2002), Franklin App. No. 01-AP-1303, 2002 WL 1767362 at *3-4, 2002-Ohio-3891, unreported, app. denied 97 Ohio St.3d 1484 (2002), ("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" and noting "the enormous significance and import of the institution of marriage") App. 66-70. 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, or confer societal recognition and approval, all of which are hallmarks of civil marriage. Of course, it does nothing at all for couples who live in violence-free homes. Nothing in the domestic violence law, which 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.

3. 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

By interpreting and invalidating Ohio's domestic violence legislation as it did, the trial court abdicated its duty to find a statute constitutional unless there is no way to interpret it in a constitutional manner. The court also neglected rules of statutory and constitutional interpretation. Implicit repeal of a statute by a new constitutional amendment is disfavored and uncalled for here. *Hupp v. Hock-Hocking Oil & Natural*

Gas Co. (1913), 88 Ohio St. 61, 70, 101 N.E. 1053, 1056; s*ee 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. *State v. Jackson* (2004), 102 Ohio St.3d 380, 382, 811 N.E.2d 68, 2004-Ohio-3206 (noting that the same rules apply to construction of constitutional amendments and statutes and require that plain meaning be given its full effect). There is no inconsistency between Article XV, Section 11 and Ohio's domestic violence law that requires invalidation of the statute. *See, e.g., State v. Sinito* (1970), 43 Ohio St.2d 97, 101, 276 N.E.2d 629 ("It is also a well-settled principle of statutory construction that where constitutional questions are raised, courts will liberally construe a statute to save it from constitutional infirmities"). Even if the court did not agree that the plain language of "legal status" and/or the final clause of the amendment can be read only as *amicus* suggests, the language can very reasonably read this way and thereby be reconciled with the domestic violence statute.

In its decision and order, the trial court characterized its invalidation of domestic violence protection for unmarried cohabitants as an "unintended" consequence of the recent amendment. (Decision and Order at 3, App. 3.) Properly interpreted, Article XV, Section 11 has no such effect and the trial court reached its contrary and erroneous conclusion only by misunderstanding its duty to reconcile the amendment with the statute: "[W]here 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, 161 (emphasis added). Here, the Court easily may interpret the statute to fall outside the amendment's reach. *In re Boggs* (1990), 50 Ohio St.3d 217, 221, 553 N.E.2d 676, 680 (when interpreting laws, a court must avoid deciding constitutional issues "unless absolutely necessary"). "It is an old and uniformly well-settled rule that questions involving the constitutionality of statutes will not be determined unless such determination is essential to the rendition of a proper judgment in the instant case." *State ex rel. Clarke v. Cook* (1921), 103 Ohio St. 465, 470, 134 N.E. 655.

CONCLUSION

For all of the foregoing reasons, the trial court erred in finding Ohio's domestic violence statute unconstitutional as applied to unmarried cohabitants. That decision should be reversed and the original felony charge of domestic violence pursuant to R.C. § 2919.25 (A) reinstated, with remand to the trial court for further proceedings.

Respectfully submitted,

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