

**IN THE SUPREME COURT OF OHIO**

STATE OF OHIO,

Plaintiff-Appellee,

v.

MICHAEL CARSWELL,

Defendant-Appellant.

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CASE NO. 2006-0151

On Appeal from the Warren County Court of Appeals, 12<sup>th</sup> Appellate District

Court of Appeals

Case No. CA 2005-04-047

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**MERIT BRIEF OF *AMICI CURAIE*  
AMERICAN CIVIL LIBERTIES UNION OF OHIO FOUNDATION, INC.  
AND AMERICAN CIVIL LIBERTIES UNION  
IN SUPPORT OF APPELLEE, STATE OF OHIO**

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**For Michael Carswell:**

THOMAS EAGLE (#0034492)  
(Counsel of Record)  
3386 North S.R. 123  
Lebanon, Ohio 45036  
(937) 743-2545

**For the State of Ohio:**

RACHEL A. HUTZEL (#0055757)  
Warren County Prosecuting Attorney  
JOSHUA A. ENGEL (#0075769)  
(Counsel of Record)  
Assistant Prosecuting Attorney  
LEW BECHTOL (#0042435)  
Assistant Prosecuting Attorney  
WARREN COUNTY PROSECUTING  
ATTORNEY'S OFFICE  
500 Justice Drive  
Lebanon, Ohio 45036  
(513) 695-1325

**For *Amici Curaie* American Civil  
Liberties Union of Ohio Foundation, Inc.  
and American Civil Liberties Union:**

CARRIE L. DAVIS (#0077041)  
Staff Attorney  
AMERICAN CIVIL LIBERTIES UNION  
OF OHIO FOUNDATION, INC.  
Max Wohl Civil Liberties Center  
4506 Chester Avenue  
Cleveland, OH 44103  
(216) 472-2200

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### **Interest of Amici**

Amicus Curiae, the American Civil Liberties Union of Ohio Foundation, Inc. (ACLU of Ohio) is a non-profit, non-partisan membership organization devoted to protecting basic constitutional rights and civil liberties for all Americans. The ACLU of Ohio believes that preserving and respecting the rule of law is imperative to our system of justice. It is in defense of these basic liberties, and for the reasons set out in this brief, that amicus curiae, the ACLU of Ohio, urges the Court to recognize that the constitutional amendment now codified at Section 11, Article XV of the Ohio Constitution has no effect on Ohio's Domestic Violence Statute, R.C. 2919.25.

Amicus Curiae, the American Civil Liberties Union (ACLU) is a non-profit, non-partisan membership organization with over 600,000 members. This case raises issues of profound importance to the ACLU and its members. The ACLU, and in particular its Lesbian Gay Bisexual Transgender Project, has long sought to ensure that the states protect all persons equally, regardless of their marital status or sexual orientation. The ACLU, through its Women's Rights Project founded in 1972 by Ruth Bader Ginsburg, is also a leader in efforts to guarantee the equal protection of law to victims of domestic violence and other forms of violence against women. The issues presented in this case have significant implications for the civil rights of unmarried persons in Ohio—whether gay or lesbian or straight—to be protected under Ohio's Domestic Violence Law.

### **Statement of Facts**

Amici ACLU of Ohio and ACLU adopt the State Appellee's Statement of Case and Facts and hereby incorporates it by reference.

## Argument

**Proposition of Law: Section 11, Article XV of the Ohio Constitution has no effect on the domestic violence law because the category of people included in the term "person living as a spouse" as used and defined in the domestic violence law, R.C. 2919.25(F)(1)(a)(i) and (F)(2), is not a category of people who have a "legal status . . . that intends to approximate the design, qualities, significance or effect of marriage."**

Prosecution of unmarried cohabitants for domestic violence, under R.C. 2919.25 (hereinafter the "Domestic Violence Statute"), does not run afoul of the constitutional prohibition on "recogni[tion of] a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage." Ohio Constitution Article XV §11 (hereinafter the "Marriage Amendment").<sup>1</sup> The judgment of the Warren County Court of Appeals was correct and should be affirmed.<sup>2</sup>

### **A. Marriage is a unique kind of legal status that is not approximated by individual application of general laws.**

Marriage is unique. There is nothing, no legal status, no arrangement that bundles together all the legal rights and responsibilities that accrue automatically to couples who are married. Under federal statutes, approximately 1,138 benefits, rights, and privileges are contingent on marital status. See U.S. General Accounting Office, "Defense of Marriage Act:

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<sup>1</sup> *Amici curiae* ACLU of Ohio and ACLU do not take occasion here to address the constitutionality of the Marriage Amendment, as doing so is wholly unnecessary for addressing the issue at bar, and this court "should avoid addressing constitutional issues "which need not necessarily be considered in reaching a decision on the case before it." *Union Carbide & Carbon Corp. v. Bargain Fair, Inc.* (1958), 157 Ohio St. 182, 186.

<sup>2</sup> As of this writing, a total of eight Appellate Districts agree that the Domestic Violence Statute is constitutional; *State v. Goshorn*, Fourth District, 2006-Ohio-2755; *State v. Adams*, Fifth District, 2005-Ohio-6333; *State v. Rodriguez*, Sixth District, 2006-Ohio-3378; *State v. Rexroad*, Seventh District, 2005-Ohio-6790; *State v. Burk* (Eighth District), 164 Ohio App. 3d 740, 2005-Ohio-672; *State v. Nixon*, Ninth District, 2006-Ohio-72; *State v. Rodgers*, Tenth District, 2006-Ohio-1528; *State v. Carswell*, Twelfth District, 2005-Ohio-6547; and only two Appellate Districts, neither in unanimous opinions, disagree; *State v. Ward*, Second District, 2006-Ohio-1407; *State v. McKinley*, Third District, 2006-Ohio-2507.

Update to Prior Report” (Jan. 2004), available at <http://www.gao.gov/htext/d04353r.html> (last visited July 11, 2006). Many more benefits accrue to couples automatically under Ohio law. For example, married couples may “jointly” file their income taxes, R.C. 5747.08(E), married couples are automatically in line to inherit from one another through Ohio’s intestacy statutes, R.C. 2127.011, etc. These legal rights arise automatically once a couple is legally married. They do not arise at all for unmarried couples.

The thousands of automatic legal rights bestowed on married couples are inherent to their legal status as “married,” not by virtue of cohabiting. In Ohio, they arise only when a couple follows the dictates of Chapter 3101 of the Revised Code. A couple must obtain a marriage license from the local court. R.C. 3101.05. The couple then must be wed by someone who has been ordained to marry couples. R.C. 3101.08. And then the completed and signed marriage license must be filed with the local court, following the ceremonial marriage. R.C. 3101.09. Only once all that has been done is a couple legally married and do the legal rights of marriage attach. Further, should the couple want to end their marriage at any time, they must follow legal procedures to do so through dissolution, R.C. 3105.61, or divorce, R.C. 3105.01. Most if not all of the legal rights that attached automatically upon marriage then cease upon dissolution or divorce.

All other legal rights that do not flow automatically with marriage cannot “create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage” because there is no such thing. Marriage is unique, and the rights that accrue automatically to married persons are unique to marriage.

Laws of general applicability – like the Domestic Violence Statute here at issue – that address crimes, contracts, or other legal rights and responsibilities between and amongst people

do not in any way “approximate marriage.” While the legislature has said the State will not extend “specific statutory benefits of a legal marriage to nonmarital relationships,” R.C. 3101.01(C), it has also expressly limited that restriction to *only* include statutes whose benefits are unique to married persons.<sup>3</sup>

**B. The Domestic Violence Statute’s inclusion of cohabitation is fundamentally different from marriage and doesn’t come close to approximating it.**

The cohabiting relationship that the State must prove in order to prosecute someone for domestic violence is radically different than the legal qualities of a marriage. The state of cohabitation, to the extent that the Domestic Violence Statute creates or recognizes any legal status, is fundamentally different from marriage and does not even come close to approximating marriage.

The definition of “cohabitation” adopted by the courts does not approximate marriage. *State v. Williams* (1997), 79 Ohio St.3d 459, is the pivotal case defining what “cohabit” means within the context of the domestic violence statute, R.C. 2919.25.<sup>4</sup> The *Williams* Court defined

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<sup>3</sup> In fact, Ohio’s General Assembly said as much when they enacted the so-called “Defense of Marriage Act,” H.B. 272, 125<sup>th</sup> Leg., Gen. Sess. (Ohio 2004) (hereinafter “Ohio DOMA”), which declared it the strong public policy of the State that it will not recognize “specific statutory benefits of a legal marriage to nonmarital relationships.” R.C. 3101.01(C). In Section 3, termed the “intent clause”, the General Assembly “[d]eclare[d] its intent not to prohibit the extension of specific benefits otherwise enjoyed by all persons to relationships between persons of the same sex or different sexes.” H.B. 272, Sec.3, 125<sup>th</sup> Leg., Gen. Sess. (Ohio 2004). The Legislative Service Commission’s final analysis of the DOMA legislation further explains that it “does not, however, prohibit the extension of specific benefits otherwise enjoyed by all persons, married or unmarried, to nonmarital relationships between persons of the same sex or different sexes, including the extension of benefits conferred by a statute *not expressly limited to married persons.*” L.S.C. Final Analysis of Sub. H.B. 272, 125<sup>th</sup> Leg., Gen. Sess. (Ohio 2004), emphasis in original.

<sup>4</sup> The courts have found that “the burden of proving cohabitation does not appear to be substantial.” *State v. Young* (Nov 20, 1998), Montgomery App. No. 16985, unreported, 1998 WL 801498, \*2+. By contrast, proving a common law marriage in Ohio (which *does have* the legal

cohabitation by a set of facts, to be found by the fact-finder. “[T]he essential elements of "cohabitation" are (1) sharing of familial or financial responsibilities and (2) consortium. [citation omitted] Possible factors establishing shared familial or financial responsibilities might include provisions for shelter, food, clothing, utilities, and/or commingled assets. Factors that might establish consortium include mutual respect, fidelity, affection, society, cooperation, solace, comfort, aid of each other, friendship, and conjugal relations. These factors are unique to each case and how much weight, if any, to give to each of these factors must be decided on a case-by-case basis by the trier of fact.” *State v. Williams* (1997), 79 Ohio St.3d 459, 465.

*Williams* specified that each court should make a case-by-case determination of whether a dating couple is “cohabiting” by looking at specific factual evidence regarding shared financial responsibilities and consortium, *Id.* at 465. Marriage, in contrast, is not piecemeal. A fact-finder does not decide whether to recognize a couple as “married” based on evidence of financial responsibilities, consortium, or any other factors. This apportioned evidentiary method of determining whether a couple is cohabiting is, quite simply, nothing like determining the existence of a marriage.

A similar question came up in the context of a federal criminal law’s use of “as a spouse” in relation to domestic violence among unmarried persons. Within the same year that Congress passed the federal Defense of Marriage Act (DOMA), Congress passed a revision to Section 922, Title 18, U.S. Code, part of the criminal code, adding clauses to a ban on firearms. This law prohibited a person who has been convicted of domestic violence from possessing a firearm. *Id.* Among the people included in the prohibition were people “who [are] cohabiting with or [have]

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status of marriage) requires proof of every element by clear and convincing evidence. *Nestor v. Nestor* (1984), 15 Ohio St.3d 143, 146 (citing cases).

cohabited with the victim as a spouse or by a person similarly situated to a spouse of the victim." Section 921(a)(33)(i), Title 18, U.S.Code.

In *United States v. Costigan*, 2000 U.S. Dist. LEXIS 8625 (D. Me. 2000), the question was raised what "as a spouse" meant and who it included. The defendant contended that DOMA precluded him from charges of domestic violence so he should be able to own a firearm. DOMA defines a spouse as "a person of the opposite sex who is a husband or wife," Section 7, Title 1 U.S.Code, and the defendant claimed that he did not cohabit with his girlfriend "as a spouse" because he was never married to and planned never to marry his live-in girlfriend. *Costigan* at 5. However, the *Costigan* court decided that Congress did not intend to limit the Firearms Bill to domestic violence only occurring in legal marriages. "After all, the statute applies to a 'former spouse' and even to one who is 'similarly situated to a spouse' in addition to our phrase of one who cohabits as a spouse." *Costigan* at 7. The *Costigan* court concluded the defendant's sentence was accurate and that DOMA did not prohibit prosecution because he was living like a spouse and not as an actual husband by law.

In *United States v. Cuervo* (C.A. 8, 2004), 354 F.3d 969, a defendant again challenged the firearms ban based on the definition of "as a spouse." The Eighth Circuit Court of Appeals found that "a common read of the statute would alert a person of ordinary intelligence that the phrase 'similarly situated to a spouse' is meant to include assaults perpetrated against those who are not spouses, yet share their defining characteristics" and not only a husband and wife. *Id.* The court found the legislature meant to apply the firearms ban to as many domestic violence perpetrators as possible, not just those in a legal marriage. *Id.* at 998. The firearms ban included that defendant, "convicted of assaulting his secretary, whom he had engaged in a long-term extramarital affair." *Id.* at 997. The court held the defendant's relationship with his secretary fell

within the statutory "as a spouse" language even though the defendant was already married to another woman and clearly had no intent to approximate marriage with his mistress. *Id.* at 998.

*Costigan* and *Cuervo* explain that the use of "as a spouse" in the firearms ban is a sweeping term meant to encompass all perpetrators of domestic violence, not to implicitly recognize their relationship. Carswell's relationship with his victim likewise does not entitle either party to the full benefits of marriage, but it satisfies the prosecution's burden of proof under Ohio's domestic violence statute in the same manner as *Costigan* and *Cuervo* satisfied the firearms bill.

The Domestic Violence Statute is a criminal law. Its inclusion of spouses, former spouses, cohabitants and recent cohabitants defines the potential categories of victims and offenders. The statute is totally unconnected to any kind of relationship recognition at all, let alone marriage.

### **Conclusion**

Prosecution of unmarried cohabitants under the Domestic Violence Statute does not "recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage." Section 11, Article XV, Ohio Constitution. The terms of the Domestic Violence Statute and the Marriage Amendment simply do not conflict. The Domestic Violence Statute addresses the unique problems of domestic violence; it does not address or create a legal status for a personal relationship approximating marriage. Marriage is unique, and identifying a factual scenario that allows an individual to be prosecuted for domestic violence in no way identifies one that resembles marriage. This Court should affirm the Appellate Court's decision and find that prosecution of Mr. Carswell is not prohibited by the Marriage Amendment.

Respectfully Submitted,

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CARRIE L. DAVIS (#0077041)  
Staff Attorney  
AMERICAN CIVIL LIBERTIES UNION OF  
OHIO FOUNDATION, INC. and AMERICAN  
CIVIL LIBERTIES UNION  
Max Wohl Civil Liberties Center  
4506 Chester Avenue  
Cleveland, OH 44103

**Certificate of Service**

I hereby certify that a copy of the foregoing was mailed to the following on this 17<sup>th</sup> day  
of July, 2006:

Thomas Eagle  
Counsel for Defendant Michael Carswell  
3386 N. State Rt. 123  
Lebanon, Ohio 45036

Rachel A. Hutzell  
Joshua A. Engel  
Lew Bechtol  
Counsel for State of Ohio  
Warren County Prosecuting Attorney's  
Office  
500 Justice Drive  
Lebanon, Ohio 45036

David Langdon  
Joshua Bolinger  
Counsel for *amicus curiae* Citizens for  
Community Values  
Langdon and Hatrman, LLC  
11175 Reading Road, Suite 104  
Cincinnati, Ohio 45241

Erika Cunliffe  
Counsel for *amicus curiae* Cuyahoga  
County Public Defender  
1200 West Third Street, 1<sup>st</sup> Floor  
Cleveland, Ohio 44113

Charles Clovis  
Counsel for *amicus curiae* Ohio Association  
of Criminal Defense Lawyers  
330 South High Street  
Columbus, Ohio 43215

---

Carrie L. Davis  
ACLU of Ohio Staff Attorney