

IN THE COURT OF APPEALS OF OHIO, EIGHT DISTRICT

COUNTY OF CUYAHOGA

No.

State of Ohio, Cuyahoga County

Plaintiff – Appellant

v.

Unknown

Defendants – Appellees

DATE: February 26, 2005

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:
: COURT OF APPEALS
:
: No.
:
: LOWER COURT NO.
:
: COMMON PLEAS COURT
:
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:
: BRIEF IN SUPPORT OF
:
: PETITIONERS
:
:
:

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QUESTION PRESENTED

Whether a state constitutional amendment that forbids the State and all local governments from enforcing domestic violence laws that recognize a legal relationship between cohabitating unwed partners violates the Equal Protection Clause of the Fourteenth Amendment because it burdens the fundamental right of unwed partners to participate in the political process and it fails rationally to advance a legitimate governmental purpose.

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	:	COURT OF APPEALS
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	:	
<i>Unknown</i>	:	BRIEF IN SUPPORT OF
	:	PETITIONERS
Defendants – Appellees	:	
	:	

DATE: February 25, 2005

OPINIONS BELOW

The Common Pleas Court of Cuyahoga County (00-CV-00000) ruling, which granted Defendant’s motion for summary judgment on the issue of constitutionality of a domestic violence statute.

JURISDICTION

The Court of Common Pleas entered its judgment on [date]. The petition for writ of certiorari was timely filed on [date]. This Court has jurisdiction under Oh Const. art. IV, § 3.

STATUTORY AND CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

The Ohio Constitutional Amendment 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 unwed partners that intends to approximate the design, qualities, significance or effect of marriage.

Oh. Const. art. XV, § 11.

Domestic violence, first degree misdemeanor pursuant to Ohio Revised Code § 2919.25 provides:

(A) No person shall knowingly cause or attempt to cause physical harm to a family or household member.

(B) No person shall recklessly cause serious physical harm to a family or household member.

(C) No person, by threat of force, shall knowingly cause a family or household member to believe that the offender will cause imminent physical harm to the family or household member.

(D) (1) Whoever violates this section is guilty of domestic violence.

(F) As used in this section and sections 2919.251 [2919.25.1] and 2919.26 of the Revised Code:

(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;

(ii) A parent or a child of the offender, or another person related by consanguinity or affinity to the offender;

(iii) A parent or a child of a spouse, person living as a spouse, or former spouse of the offender, or another person related by consanguinity or affinity to a spouse, person living as a spouse, or former spouse of the offender.

(b) The natural parent of any child of whom the offender is the other natural parent or is the putative other natural parent.

(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.

OHIO REV. CODE ANN. § 2919.25.

STATEMENT *of* CASE

Statement of the facts pertaining to the brief can be included in this section.

SUMMARY of ARGUMENT

Attempts to vanquish a particular group, namely unwed partners, from equal participation in the political process fails Fourteenth Amendment jurisprudence. The governing principles that the Court used to review the discriminatory enactments in both *Romer* and *Hunter* are controlling in this case. *See Hunter v. Erickson*, 393 U.S. 385, 393 (1969) (“the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person’s vote or give any group a smaller representation than another of comparable size.”). The touchstone should be that judicial deference to the state amendment is inappropriate when such law is non-neutral (i.e. discriminates against a particular group) and deprives equal participation in the political process. Applying that touchstone to the Ohio amendment, judicial deference would be inappropriate when a particular group, specifically unwed partners, is singled out for disparate treatment. The amendment is a sweeping and comprehensive change in the legal status of unmarried victims of domestic violence that substantially affects the structure and operation of modern domestic violence laws. *See Romer v. Evans*, 517 U.S. 620, 626-627 (1996). Furthermore, the ultimate affect of the amendment places a permanent bar on future statues, regulations, ordinances, or policies unless the state constitution is first amended to permit such measures. In other words, when the State uses its constitution to affirmatively disable all lawmaking and law-enforcing processes, a heightened level of review should be applied. In sum, the state constitutional bar denying equal access to all ordinary levels of government for a particular group, exclusively unwed partners and not everyone else, is a blatant infringement upon equal participation in the political process and an Equal Protection violation

Even if this Court declines to apply heightened scrutiny to the state constitutional amendment, it should conclude that the amendment lacks a rational relationship to the achievement of any legitimate government purpose.

First, the second clause of Ohio Article XV, section 11 is overbroad and has far-reaching scope, beyond the intent of Ohio’s marriage laws. House Bill #272 (*See Ohio Revised Code* § 3101.01 ... amended Ohio’s marriage law) was not designed to prohibit the extension of specific benefits otherwise enjoyed by all persons (married or unmarried) nor to make substantive changes in the law of this state that is in effect on the day prior to the effective date of this act. Ohio Article XV, section 11 not only denies the benefit of protection from domestic violence to

cohabitating unmarried persons, but it also makes substantive changes to the structure and operation of modern domestic violence statutes. Interpretation of the amendment can only turn to a general intent to “define marriage.” The first sentence of the amendment achieves that purpose when it 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.” The second sentence functions outside the scope of the general intent to define marriage by revoking all benefits and protections that rely on some sort of legal status for cohabitating unwed partners. Proponents argue that the second sentence operates to prevent substitutes for marriage. It begs the question, where in the first sentence is that purpose not achieved? The plain reality is that intent and purpose of the second sentence is overbroad and has far-reaching scope, beyond the general intent to define marriage.

Second, unmarried victims of domestic violence are unnecessarily stripped of protection because Ohio Article XV, section 11 is an unreasonable overinclusive classification. The amendment, on its face, makes unwed partners a target. However, the underlying motivations behind the statute are targeting same-sex marriage and not unmarried victims of domestic violence. Targeting unwed partners is an unreasonable classification because it intentionally singles out unmarried individuals for disparate treatment that has a substantial effect on their benefits and protections. Targeting same-sex marriage and not unmarried victims of domestic violence is also an unreasonable classification because the amendment operates as an overinclusive mechanism where an alternative rule could achieve the same purpose with more precision and less cost. Both the facial and underlying purposes behind the amendment have a substantial effect when an entire class of persons, namely unwed partners, is systematically excluded from Ohio’s laws. As Justice Kennedy would say, “a State cannot so deem a class of persons a stranger to its laws.” *Romer*, 517 U.S. at 635.

INTRODUCTION

The Ohio legislature was one of eleven states that had a referendum on the ballot to amend the state constitution to define marriage between a man and a woman.¹ Ohio is unique in

¹ *All 11 Ballot Initiatives Protecting Marriage Pass*, Same-Sex Marriage- Post-Election Update (Republican Policy Committee, U.S. Senator Jon Kyl), November 5, 2004 at http://rpc.senate.gov/_files/Nov0504SameSexMarriageSD.pdf. Thirteen states adopted a state constitutional amendment defining marriage. Missouri and Louisiana adopted their amendments on Aug 3 and Sept 18 respectively. States that passed November ballot referendums included

that it included a second clause mandating that the State “shall not create or recognize a legal status for relationships of unwed partners that intends to approximate the design, qualities, significance or effect of marriage.” OH. CONST. AMEND. XV, § 11. The question arises when unmarried victims of domestic violence are denied protection under the Ohio Revised Code §2919.25 because the State is not allowed to create or recognize cohabitation as a “legal relationship.” In domestic violence laws, a “person living as a spouse” has traditionally been included as a “family or household member” when they have been living in a common law marital relationship or cohabitating for at least five years. OHIO REV. CODE ANN. § 2919.25(F)(2). Ohio Article XV, section 11 creates a distinction between married and unwed partners. As a result, only married victims can find shelter under Ohio’s domestic violence laws. This poses two constitutional concerns. First, the amendment displaces modern domestic violence laws² and “forbids the reinstatement of these laws and policies” without amending the Ohio constitution first. *See Romer*, 517 U.S. at 627. The end result is the exclusion of unmarried victims of domestic violence from obtaining protections from ordinary legislative, administrative, and judicial forums. The group can only reinstate laws and policies by petitioning the statewide electorate, a burden that fundamentally restructures the political process. Second, the amendment creates enormous disparity in domestic violence laws for otherwise identical situations. Consequently, unmarried victims who are similarly situated to married victims receive disparate treatment in violation of the Fourteenth Amendment Equal Protection Clause.

ARGUMENT

I. A State Constitutional Amendment That Singles Out Unwed Partners And Purposely Deprives Them All Ordinary Channels To Seek Relief Through The Political Process Requires Heightened Scrutiny Under The Equal Protection Clause of the Fourteenth Amendment.

The Fourteenth Amendment provides that, “[n]o State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. AMEND. XIV, § 1. In other words, “[t]hat command

Arkansas, Georgia, Kentucky, Michigan, Mississippi, Montana, North Dakota, Ohio, Oregon, and Utah. There are lawsuits pending in eleven states seeking to recognize same-sex marriage.

² Statutes displaced include Criminal Domestic Violence Statutes: Ohio Revised Code §2919.25, §2919.26, and §2919.27. Civil Protection Order Statutes: Ohio Revised Code §3113.31.

is violated when a state's constitution renders some persons ineligible for the protection of the laws from an entire category of mistreatment."³ Ohio Article XV, section 11 renders unwed partners ineligible for protection from an entire category of mistreatment, namely domestic violence. The amendment has the effect of creating "a unique hole in the state's fabric of existing and potential legal protections" for unmarried victims of domestic violence.⁴ In addition to displacing laws protecting unmarried victims, the state constitutional amendment "disables all lawmaking" and puts cohabitating unwed partners "beyond the reach of the state's system for enacting and enforcing laws."⁵ The resulting effect of the amendment works a deprivation when it denies cohabitating unwed partners the right to equal participation in the political process.

A. States May Not Deprive Individuals Of Equal Participation In The Political Process

The state constitutional amendment is vertically broad when it deprives cohabitating unwed partners from equal participation in day-to-day political processes. State laws disenfranchising a particular group receive close scrutiny. *See Kramer v. Union Free School District*, 395 U.S. 621, 627 (1969) ("If a challenged state statute grants the right to vote to some ... residents ... and denies the franchise to others, the court must determine whether the exclusions are necessary to promote a compelling state interest."); *Dunn v. Blumstein*, 405 U.S. 330, 337 (1972); *Cipriano v. City of Houma*, 395 U.S. 701, 704 (1969); *Hill v. Stone*, 421 U.S. 289, 295, 297, 300 (1975). Similarly, weighing votes unequally has been reviewed by the Court under heightened scrutiny. *See Reynolds v. Sims*, 377 U.S. 533, 561-562 (1964) ("The right to vote can neither be denied outright nor destroyed by alteration of ballots, nor diluted by ballot-box stuffing. Undoubtedly, the right of suffrage is a fundamental manner ... any infringement of the right of citizens to vote must be carefully and meticulously scrutinized."); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 670 (1966) ("Where fundamental rights and liberties are asserted under the Equal Protection Clause of the Fourteenth Amendment, classifications which might invade or restrain them must be closely scrutinized and carefully confined."); *Gray v.*

³ Lawrence H. Tribe, Brief in Support of Respondents, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039)

⁴ *Id.* (The amendment "creates, for selected persons, a unique hole in the state's fabric of existing and potential legal protections against that admitted wrong, it provides a paradigm case of what it means for a state to structure its legal system so as to deny to persons within its jurisdiction the equal protection of the laws.")

⁵ *Id.* (The State "used its constitution affirmatively to disable all lawmaking and law-enforcing processes within its borders whether involving state legislation, a local ordinance, or the adoption or enforcement of a policy by executives, administrators, or judges ... inserting a ban into the state constitution puts the matter beyond the reach of the state's system for making and enforcing laws.")

Sanders, 372 U.S. 368, 379 (1963) (“all who participate in the election are to have an equal vote -- whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit.”). More specifically, the Court has continually protected against vote dilution and the State’s attempt to degrade influence in political process. See *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (Alabama cannot fence out African-Americans by diminishing the effectiveness of their vote in municipal elections.); *Davis v. Bandemer*, 478 U.S. 109, 131-132 (1986) (“unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter’s or a group of voters’ influence on the political process as a whole.”).

Under rational basis review, States are accorded wide latitude and deference in statutory discriminations. *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). However, the cases mentioned above are instances where the Court has departed from the deferential standard. The Court adopted a heightened level of scrutiny when reviewing claims of disenfranchisement, vote dilution, or degrading influence in the political process. That common thread in the Court’s Fourteenth Amendment jurisprudence safeguards equal access and participation in the political process.

Nevertheless, the “Fourteenth Amendment must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons.” *Romer*, 517 U.S. at 631. However, the State and local governments’ authority to restructure their political processes cannot infringe upon a mandate of the U.S. Constitution. See *Gomillion*, 364 U.S. at 345 (The State cannot cloak discrimination in garb of realignment of political subdivisions.). Despite the practical realities that legislation classifies and disadvantages certain groups, State and local governments still cannot block equal participation in the political process. In light of those limitations, the Court generally reviews legislation under the assumption that “even improvident decisions will be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.” *Vance v. Bradley*, 440 U.S. 93, 97 (1979). The Court gives broad deference to the democratic process to solve inequities rather than judicial intervention. Yet, Ohio Article XV, section 11 prohibits action on all levels of government and excludes a particular group in the regular legislative processes. The “ultimate effect” of the amendment is to “prohibit any government entity from adopting similar, or more protective

statutes, regulations, ordinances, or policies in the future unless the state constitution is first amended to permit such measures.” *Romer*, 517 U.S. at 627. The Court can no longer rely on the democratic process alone to prevent arbitrary discrimination: since, by definition, such discrimination restricts the voices that can be heard in the democratic process, it “is unlikely to be soon rectified by legislation means.”⁶ *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985).

The Court has previously addressed the issue of depriving equal participation in the political process when it held that “[t]he State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person’s vote or give any group a smaller representation than another of comparable size.” *Hunter*, 393 U.S. at 393. The issue in *Hunter* was a housing ordinance, which voters amended, to prevent “any ordinance dealing with racial, religious, or ancestral discrimination in housing without the approval of the majority of voters of Akron.” *Id.* at 386. The court held that the housing ordinance “discriminates against minorities, and constitutes a real, substantial, and invidious denial of the equal protection of the laws.” *Id.* at 393. *Hunter* finds its origins in the “one person, one vote” line of authority held in *Reynolds*. *Id.* at 393. The *Hunter* decision also refers to “principles of neutrality” in the legislative process. *Id.* at 394. Justice Harlan explains the neutrality principle by testing laws that define political institutions by whether “they are designed with the aim of providing a just framework within which the diverse political groups in our society may fairly compete and are not enacted with the purpose of assisting one particular group in its struggle with its political opponents.” *Id.* at 393 (Harlan, J., concurring). Ohio Article XV, section 11 singles out a category of legislation to protect married individuals and deprives members of the other group, namely cohabitating unwed partners, equal protection of the laws. This violates principles of neutrality that the Fourteenth Amendment is designed to protect in the structure of the political process.

The Court addresses the *Hunter* doctrine again when it held that “the political majority may generally restructure the political process to place obstacles in the path of *everyone* seeking to secure the benefits of government action.” *Washington v. Seattle School District*, 458 U.S. 457 (1982) (emphasis added). “But a different analysis is required when the State allocates governmental power non-neutrally, by explicitly using the racial nature of a decision to

⁶ Jean E. Dubofsky, Roderick M. Hills, Brief for Respondents, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039)

determine the decision-making process.” *Id.* at 457. *Hunter* and *Seattle School District* were both examples of the court invalidating enactments that restructure the political process that burden minorities based on racial discrimination. *Romer v. Evans* marks the Court’s willingness to extend the principles in *Hunter* and *Seattle School district* to not only racially motivated legislation, but enactments that discriminate against sexual orientation. The issue in *Romer* was whether a Colorado constitutional amendment that forbids the state government and all local governments from adopting or enforcing any law or policy protecting gay people from discrimination violates the Equal Protection Clause. The *Romer* Court found that “sweeping and comprehensive is the change in legal status effected by this law” indicating the problems with the changes Colorado Amendment 2 makes to the structure and operation of modern anti-discrimination laws. *Romer*, 517 U.S. at 626-627. The Court further stated that “the amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies.” *Id.* at 627. The *Romer* Court was in line with the *Hunter* when it stated that “a law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.” *Id.* at 634. The *Romer* Court concluded that Colorado’s Amendment 2 “has far-reaching deficiencies ... and the principle it offends are conventional and venerable; a law must bear a rational relationship to a legitimate governmental purpose.” *Id.* at 635. Justice Kennedy succinctly concludes the decision when he says “a State cannot so deem a class of persons a stranger to its laws.” *Id.* at 635.

The governing principles that the Court used to review the discriminatory enactments in both *Romer* and *Hunter* are controlling in this case. The touchstone should be that judicial deference to the state amendment is inappropriate when such law is non-neutral (i.e. discriminates against a particular group) and deprives equal participation in the political process. Applying that touchstone to the Ohio amendment, judicial deference would be inappropriate when a particular group, namely unwed partners, is singled out for disparate treatment. The amendment is a sweeping and comprehensive change in the legal status of unmarried victims that substantially affects the structure and operation of modern domestic violence laws. *See Romer* at 626-627 (“sweeping and comprehensive is the change in legal status effected by this law”). Furthermore, the ultimate affect of the amendment places a permanent bar on future statues,

regulations, ordinances, or policies unless the state constitution is first amended to permit such measures. In other words, when the State uses its constitution to affirmatively disable all lawmaking and law-enforcing processes, a heightened level of review should be applied. In sum, the state constitutional bar denying equal access to all ordinary levels of government for a particular group, exclusively unwed partners and not everyone else, is a blatant infringement upon equal participation in the political process and an Equal Protection violation.

B. Heightened Scrutiny Does Not Always Require A Suspect Class

The general rule is that “unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be *rationally related to a legitimate state interest*.” *Dukes*, 427 U.S. at 303 (emphasis added). Encroachment on a fundamental right or creating a suspect classification typically triggers a heightened level of scrutiny. The touchstone standard elicited above is a heightened standard of review when a state law is non-neutral and infringes upon equal participation in the political process. This standard is derived from principles in both *Romer* and *Hunter* decisions and grounded in the concept of “one person, one vote” from *Reynolds*. All are explicity connected to a fundamental right to have equal participation in the democratic political process.

Even though *Hunter*, *Washington v. Seattle School District*, and *Gomillion* involved suspect classifications of race, those decisions are not confined exclusively to race motivated legislation. In fact, when Justice Harlan’s explained principles of neutrality, he did so without referring to race. The concept of structuring government neutrally, as opposed to race-neutral, was how the Court envisioned the Fourteenth Amendment to be applied. In the words of Justice Stevens, “there is only one Equal Protection Clause ... since the Clause does not make some groups of citizens more equal than others ... protection against vote dilution cannot be confined to racial groups.” *Karcher v. Dagget*, 462 U.S. 725, 749 (1983) (Stevens, J., concurring).

Equal participation in the political process belongs to all people, not just racial groups. *Romer* affirms this precept when the *Hunter* doctrine is extended to a case involving a state constitutional amendment that discriminates on the basis of sexual orientation.

II. Even If This Court Declines To Apply Heightened Scrutiny To The State Constitutional Amendment, It should Conclude That The Amendment Lacks A Rational Relationship To The Achievement Of Any Legitimate Government Purpose.

Under rational basis review, unless the state law infringes upon a fundamental right or creates a suspect classification, the court will require only that the classification challenged be *rationaly related to a legitimate state interest*. *Dukes*, 427 U.S. at 303 (emphasis added). The challenger has the burden of proof. There is a strong presumption in favor of the laws that are challenged under rational basis test. *McGowan v. Maryland*, 366 U.S. 420, 425-426 (1961). This presumption of rationality can only be overcome by a clear showing of arbitrariness and irrationality. *Hodel v. Indiana*, 452 U.S. 314, 331-332 (1981). Arbitrary or irrationality is shown by either demonstrating that there was no legitimate purpose or that the means used are not a reasonable way of accomplishing the goal.

First, the court must determine whether government has advanced a legitimate purpose. Government has a legitimate purpose if it advances a traditional “police” purpose. *Berman v. Parker*, 348 U.S. 26, 32 (1954) (i.e. protecting safety, public health, public morals, peace and quiet, or law and order.) The Court has declared that, under rational basis review, *any* conceivable legitimate purpose is sufficient. *McGowan*, 366 U.S. at 426 (emphasis added).

Second, the court must examine “whether the classifications drawn in a statute are reasonable in light of its purpose?” *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964). “Laws will be upheld unless the government’s action is “clearly wrong, a display of arbitrary power, not an exercise of judgment.” *Mathews v. DeCastro*, 429 U.S. 181, 185 (1976). Laws that are substantially underinclusive, when they do not regulate all who are similarly situated, raise the concern that the government has enacted a law that targets a particular politically powerless group or that exempts those with more political clout. The Court has said that in rational basis test, substantial underinclusiveness is allowed because the government “may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.” *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955). Laws that are substantially overinclusive are those that regulate individuals who are not similarly situated, that is, if it covers more people than it needs to in order to accomplish its purpose. Overinclusive laws are unfair to those who are unnecessarily regulated, and they risk “burdening a politically powerless group which would have been spared if it had enough clout to compel normal attention to the relevant

costs and benefits.”⁷ Court has said in the past that if any alternative rule is likely to be less precise, and will be more costly, then the Court will uphold the law. *New York Transit Authority v. Beazer*, 440 U.S. 568, 590 (1979).

A. The Second Clause Of Ohio Article XV, Section 11 Is Not Rationally Related To Any Legitimate Government Interest In Defining Marriage.

The second clause of Ohio Article XV, section 11 is overbroad and has far-reaching scope, beyond the intent of Ohio’s marriage laws. Proponents argue that traditional marriage was under assault when other states began to recognize same-sex marriage and this amendment is a coordinated effort with House Bill #272 to protect traditional marriage. Unlike House Bill #272, the state constitutional amendment does not have an intent clause to guide interpretation of the state law. House Bill #272 amended Ohio’s marriage law (Ohio Revised Code §3101.01 and §3105.12):

to specifically declare that same-sex marriages are against the strong public policy of the state, provides that same-sex marriages entered into another jurisdiction have no legal force in Ohio, to declare that the recognition or extension by the state of the specific statutory benefits of legal marriage to non-marital relationships is against the public policy of the state, and to make other declarations regarding same-sex marriages.⁸

House Bill #272 was widely referred to as the Defense of Marriage Act (“DOMA”). It was introduced in September 16th, 2003 and was approved by both chambers on February 3rd, 2004.

The drafters of the House Bill #272 were careful to insert an intent clause:

(A) The General Assembly declares and reaffirms the state of Ohio's historical commitment to the institution of marriage as a union between a man and a woman as husband and wife.

(B) The General Assembly declares its intent to define marriage and clarify that relationships that are intended as substitutes for marriage, including but not limited to "civil unions" as provided for in *Vt. Stat. Ann. tit. 15, § 1202* (2003), will not be recognized in this state.

(C) It is not the intent of the General Assembly to prohibit the extension of specific benefits otherwise enjoyed by all persons, married or unmarried, to relationships between persons of the same sex or different sexes.

(D) The General Assembly declares its intent not to make substantive changes in the law of this state that is in effect on the day

⁷ Lawrence H. Tribe, *American Constitutional Law* 1449 (2d ed. 1988).

⁸ LEGISLATIVE SERVICES COMM., FINAL ANALYSIS, H.B. 272, 125th Gen. Assem., 2003-2004 Reg. Session (Oh. 2004).

prior to the effective date of this act with respect to the validity of marriages heretofore occurring within this state.

OHIO REV. CODE ANN. § 3101.01. The Ohio constitutional amendment does not include a similar intent clause. At least with the House Bill #272, the intent of the drafters is discernable because there is an explicit declaration. The same cannot be said for the state constitutional amendment. Proponents argue that both the state constitutional amendment and House Bill #272 have substantially similar language and since both were enacted during the same push to protect traditional marriage that the intent clause in House Bill #272 should be considered in any interpretation of the state constitutional amendment. Attempts to transfer the intent clause of House Bill #272 to the state constitutional amendment cannot reconcile why the second clause of Ohio Article XV, section 11 does not recognize any legal status for relationships of unmarried persons under any context or circumstance, but Ohio Revised Code §3101.01 and §3105.12 does. Ohio's marriage law was not designed to prohibit the extension of specific benefits otherwise enjoyed by all persons, married or unmarried, to relationships between persons of the same sex or different sexes nor to make substantive changes in the law of this state that is in effect on the day prior to the effective date of this act with respect to the validity of marriages occurring within this state. Ohio Article XV, section 11 not only denies the benefit of protection from domestic violence to cohabitating unwed partners, but it also makes substantive changes to the structure and operation of modern domestic violence statutes. The scope of the second clause of Ohio Article XV, section 11 does not fit within the Ohio legislature's intent and purpose for Ohio's marriage laws.

Moreover, Governor Taft publicly recognized that the second clause of Ohio Article XV, section 11 is overbroad and goes beyond House Bill #272. On October 13th, 2004, the Governor issued a news release publicly announcing his decision to vote "no" on the ballot referendum Issue 1 (Ohio Article XV, section 11). The Governor stated:

First, Issue 1 is unnecessary. I signed House Bill 272, Ohio's Defense of Marriage Act into law last February. That act was narrowly drafted and reaffirms what I strongly believe and will always defend, that marriage is the union of one man and one woman. Ohio is also protected against out of state decisions and enactments that dilute marriage by the federal Defense of Marriage Act.

Second, Issue 1 is overbroad. The first sentence is fine and I strongly support it. However, the second sentence goes beyond House Bill 272 into uncharted waters. It is an ambiguous invitation to litigation that will

result in unintended consequences for senior citizens and for any two persons who share living accommodations. There will be as many interpretations of the words, “Intends to approximate the design, qualities, significance or effect of marriage,” as there are judges in the state of Ohio⁹

House Bill #272 was narrow enough to prevent the displacement of modern domestic violence statutes while achieving the desired purpose of protecting traditional marriage. The Governor correctly recognizes that the overbroad and far-reaching scope of the second clause of Ohio Article XV, section 11 displaces good law unnecessarily when the government’s legitimate purpose in protecting traditional marriage is already achieved by House Bill #272 and the first sentence of the amendment.

Since there is no intent clause accompanying the state constitutional amendment and the second clause of Ohio Article XV, section 11 fails to reconcile with the intent and purpose in House Bill #272, interpretation of the amendment can only turn to a general intent to “define marriage.” The first sentence of the amendment achieves that purpose when it 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.” The second sentence functions outside the scope of the general intent to define marriage by revoking all benefits and protections that rely on some sort of legal status of unmarried persons. Proponents argue that the second sentence operates to prevent substitutes for marriage. It begs the question, where in the first sentence is that purpose not achieved? The plain reality is that intent and purpose of the second sentence is overbroad and has far-reaching scope, beyond the general intent to define marriage.

It is sufficient for the state to offer *any* conceivable legitimate purpose. *McGowan*, 366 U.S. at 426 (emphasis added). The Court has previously declared that government has a legitimate purpose if it advances a traditional “police” purpose. *Berman*, 348 U.S. at 32 (i.e. protecting safety, public health, public morals, peace and quiet, or law and order). In theory, the government can invent some purpose to guard the amendment from being invalidated by the courts. Nevertheless, the Ohio legislature has declared its intent and purpose behind marriage laws in House Bill #272. To protect traditional marriage and prevent substitutes while not stripping current benefits and protections otherwise enjoyed by all persons, married or unmarried, nor displacing substantive law on the books prior to the effective date of the

⁹ Press Release, Governor Bob Taft (Oh.), Taft Releases Statement on Issue 1 (October 13, 2004) at <http://www.governor.ohio.gov/releases/101304issue1.htm>.

amendment. Even though the intent of House Bill #272 cannot be directly reconciled with Ohio Article XV, section 11, it is difficult for the government to escape the purpose offered behind Ohio's marriage laws. To argue a legitimate purpose outside and beyond the general intent to "define marriage" would be inconsistent with Ohio's previous positions on the definition of marriage.

All together, Ohio Article XV, section 11 must be interpreted in light of Ohio's general interest in "defining marriage." The intent is achieved by the first sentence of the amendment and existing Ohio marriage law. The second sentence is overbroad and has far-reaching scope when it goes beyond just "defining marriage." Furthermore, the amendment cannot be reconciled with Ohio's existing marriage law (House Bill #272) when it strips benefits and protections otherwise enjoyed by all persons, married or unmarried, and displaces modern domestic violence statutes.

B. The Classification Drawn In Ohio Article XV, Section 11 Is An Unreasonable Overinclusive Classification In Light Of The Purported Legitimate Government Interest.

Unmarried victims of domestic violence are unnecessarily stripped of protection because Ohio Article XV, section 11 is an unreasonable overinclusive classification. The amendment creates a distinction between married and unwed partners with a general purpose to "define marriage." The amendment, on its face, makes unwed partners a target. However, the underlying motivations behind the statute are targeting same-sex marriage and not unmarried victims of domestic violence. Targeting unwed partners is an unreasonable classification because it intentionally singles out unwed partners for disparate treatment that has a substantial effect on their benefits and protections. Targeting same-sex marriage and not unmarried victims of domestic violence is an unreasonable classification because the amendment operates as an overinclusive mechanism where an alternative rule could achieve the same purpose with more precision and less cost.

Laws that are substantially overinclusive are those that regulate individuals who are not similarly situated, that is, if it covers more people than it needs to in order to accomplish its purpose. Overinclusive laws are unfair to those who are unnecessarily regulated, and they risk "burdening a politically powerless group which would have been spared if it had enough clout to

compel normal attention to the relevant costs and benefits.”¹⁰ The Court has said in the past that if any alternative rule is likely to be less precise, and will be more costly, then the Court will uphold the law. *Beazer*, 440 U.S. at 590. Ohio’s marriage law achieves the State’s interests in defining marriage with less cost and burden placed on unwed partners while the amendment’s broad and sweeping change in legal status creates enormous disparities for similarly situated persons.

Unwed partners are a target of Ohio Article XV, section 11 in the express language of the amendment, but are not the underlying motivation behind the amendment. House Bill #272 was sparked by increased litigation on the definition of marriage. More specifically, the Massachusetts Supreme Court handed down its *Goodridge v. Department of Public Health*¹¹ decision on November 18, 2003. *See Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N.E.2d 941 (2003). This ruling sent reverberations across the country and motivated defense of marriage legislation in many states, including Ohio.

In *Goodridge v. Department of Pub. Health*, the court considered the constitutional question "whether the Commonwealth may use its formidable regulatory authority to bar same-sex couples from civil marriage" *Goodridge*, 440 Mass. at 312-313. The court concluded that it may not do so, determining that the Commonwealth had failed to articulate a rational basis for denying civil marriage to same-sex couples. The court stated that the Massachusetts Constitution "affirms the dignity and equality of all individuals" and "forbids the creation of second-class citizens." *Id.* at 312. The court concluded that in "limiting the protections, benefits, and obligations of civil marriage to opposite-sex couples, violates the basic premises of individual liberty and equality under law protected by the Massachusetts Constitution." *Id.* at 342.

Proponents argue that Ohio Article XV, section 11 was designed to preempt judicial interventions along with State and local laws that recognized protections for unwed partners. In short, the underlying motivation behind DOMA legislation was to prevent recognition of same-sex marriage. Homosexuals as a subset of unwed partners were the target group and not the subset of unwed partners of domestic violence. The underlying motivation of preventing substitutes for marriage implicitly targets sexual orientation when Ohio’s strong public policy is

¹⁰ Lawrence H. Tribe, *American Constitutional Law* 1449 (2d ed. 1988).

¹¹ *Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N.E.2d 941 (2003). *See Opinions of the Justices to the Senate*, 440 Mass. 1201, 1203-1204 (Mass., 2004).

to deny homosexual civil unions recognition. Turning to the structure and operation of Domestic violence statutes, they do not hinge on sexual orientation, but rather who is classified as a “family or household member.” In other words, when a son abuses his mother, the sexual orientation of the son is irrelevant in the eyes of domestic violence statutes. The sweeping and comprehensive change in the legal status of unmarried persons has bundled unwed partners of domestic violence into the ambit of legislation directed towards a different group. Therefore, Ohio Article XV has an overinclusive reach that substantially affects that benefits and protections of unwed partners of domestic violence. Even though the Court has upheld laws that are substantially overinclusive, the sheer depth and breadth of the amendment’s reach cannot be ignored when examining whether this is an unreasonable overinclusive classification. Likewise, the amendment’s purpose could be achieved by a less burdensome alternative rule that is more likely to be precise in application and less costly when it doesn’t displace the structure and operation of modern domestic violence statutes. *See Beazer*, 440 U.S. at 590.

In the same breadth, interpretation of the amendment, on its face, targets “relationships of unwed partners” which include different sex and same-sex relationships. Unwed partners of domestic violence, in the plain language of the amendment, become targets. The amendment prohibits the State and all local governments from enacting or enforcing statutes, regulations, ordinances, or policies. This intentionally strips benefits and protections from unwed partners. The effect is substantial when an entire class of persons, namely unwed partners, is systematically excluded from Ohio’s laws. As Justice Kennedy would say, “a State cannot so deem a class of persons a stranger to its laws.” *Romer*, 517 U.S. at 635.

CONCLUSION

For the foregoing reasons, we respectfully request that the Court narrowly construe the interpretation of the second clause of Ohio Article XV, section 11 to remedy the displacement in domestic violence laws.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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