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Gay marriage ban raises questions

By *Laura Bischoff*
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Two years ago, Democratic and Republican leaders urged Ohio voters to reject a state constitutional amendment to ban gay marriage.

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They warned that the poorly worded proposal could trigger unforeseen consequences.

Voters approved it by nearly a 2-to-1 ratio. Now it's time for the consequences.

In a case from Warren County, Michael Carswell says that he shouldn't be charged with felony domestic violence against his girlfriend because a 27-year-old domestic-violence state law conflicts with the constitutional gay-marriage ban.

The Ohio Supreme Court will hear the case in December.

The case is drawing attention across the nation. More than 60 organizations filed friend-of-the-court briefs in the case.

If the state Supreme Court strikes down part of the domestic-violence law, it could wipe out long-standing legal protections for unmarried Ohioans in abusive relationships.

More than a half-million unmarried Ohioans live with a partner. About half of the nearly 73,000 domestic-violence calls across the state last year involved unmarried people.

Such a ruling in Ohio could lead defense counsel to argue the constitutionality of domestic-violence laws in other states, said attorney Michael Smalz, chairman of the family law task force at the Ohio State Legal Services Association.

While 18 other states adopted gay-marriage bans in their constitutions, the Ohio Supreme Court may be the first state high court to hear a case involving the bans, said Ohio State University associate law professor Marc Spindelman.

In the past two years, more than 60 men accused of domestic violence against their girlfriends have argued that Ohio's domestic-violence law conflicts with the ban:

The constitutional amendment bars state or local governments from granting a legal status to relationships that approximate marriage.

The domestic-violence law protects people "living as a spouse."

When lower courts rejected this argument, about 30 defendants appealed. Two appellate courts agreed with their argument; others have rejected it. The Ohio Supreme Court agreed to hear Carswell to settle the conflicting appellate rulings.

Domestic-violence laws offer more protections to victims and stiffer penalties for abusers than simple assault laws.

While the domestic-violence law may be at risk, the flip side of the case is how broadly the new marriage amendment will be applied in Ohio.

The Carswell ruling might be applied in a lawsuit against Miami University over giving domestic-partner benefits to university employees.

Cincinnati-based Citizens for Community Values, which worked closely with Republican Secretary of State Ken Blackwell to pass the marriage amendment, filed a friend-of-the-court brief supporting Carswell's argument.

CCV argued that while the group deplores domestic violence, the marriage amendment should be broadly applied and part of the law ruled unconstitutional.

"CCV believes a case such as this could lead to an inadvertent narrowing of the scope of the amendment by the court, as the motivation is great to preserve an understandably popular statute in its present form," CCV attorney David Langdon wrote.

CCV, Carswell's attorney, and the Ohio Association of Criminal Defense Lawyers argue that the part of the domestic violence law that includes people "living as a spouse" conflicts with the Constitution because it grants a legal status to relationships that approximate marriage.

The state, ACLU, Ohio Domestic Violence Network, and about 50 other groups argue that recognizing "persons living as a spouse" does not equate to granting legal status.

OSU's Spindelman says the case spells trouble for cultural conservatives, regardless of its outcome.

If the court rejects CCV's argument, "it will set a powerful and from their perspective troubling precedent: that the marriage amendment's terms can, and in some instances, should be watered down," Spindelman wrote in *Legal Times*.

Spindelman said if the state Supreme Court finds that Ohio's domestic violence law is only for married couples, then the marriage amendment could be challenged on federal constitutional grounds. Settled federal constitutional law says the state cannot draw distinctions between married and unmarried couples for criminal law purposes, Spindelman said.

CCV attorney Langdon did not return telephone messages requesting an interview on the Carswell case.

The Ohio General Assembly is considering a bill to rework the domestic violence law by striking out "persons living as a spouse" and expanding it to any person living with the offender.

Legal Aid Society of Cleveland attorney Alexandria Ruden, who co-wrote Ohio Domestic Violence Law, says there's a huge downside to expanding the domestic-violence laws that way. The law would become over-inclusive and under-inclusive at the same time, Ruden said. For example, it would no longer cover ex-boyfriends or ex-girlfriends but it would cover cell mates and college roommates, she said.

"Once you open the system to everybody, it dilutes the system," Ruden said.

That could lead to an avalanche of cases in the court, leading the legal system to take it less seriously, she warned.

"It may have a further unintended consequence, which is to unravel gains we've made in this area," Ruden said.

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