No. 09-30036

IN THE

United States Court of Appeals for the Fifth Circuit

OREN ADAR, Individually and as Parent and Next Friend of J.C.A.-S. a minor; MICKEY RAY SMITH, Individually and as Parent and Next Friend of J.C.A.-S. a minor,

Plaintiffs – Appellees,

v.

DARLENE W. SMITH, In Her Capacity as State Registrar and Director, Office of Vital Records and Statistics, State of Louisiana Department of Health and Hospitals,

Defendant – Appellant.

On Appeal from the United States District Court for the Eastern District of Louisiana

---

BRIEF OF *AMICUS CURIAE* FAMILY RESEARCH COUNCIL AND THE LOUISIANA FAMILY FORUM IN SUPPORT OF DEFENDANT-APPELLANT

Brian W. Raum
Austin R. Nimocks
Timothy J. Tracey
ALLIANCE DEFENSE FUND
15100 N. 90th Street
Scottsdale, AZ 85260
Tel: (480) 444-0020
Fax: (480) 444-0028

COUNSEL FOR *AMICUS CURIAE*

CERTIFICATE OF INTERESTED PERSONS

No. 09-30036, *Oren Adar et al. v. Darlene W. Smith*.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These presentations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Appellant
Darlene W. Smith

Counsel for Appellant
James D. "Buddy" Caldwell
Kyle Duncan
Carol L. Haynes

Appellees
Oren Adar
Mickey Ray Smith

Counsel for Appellees
Kenneth D. Upton, Jr.
Regina O. Matthews
Spencer R. Doody

Amicus Curiae
Family Research Council
Louisiana Family Forum

Counsel for Amicus Curiae
Brian W. Raum
Austin R. Nimocks
Timothy J. Tracey

Dated: May 28, 2009.

Alliance Defense Fund

____

Austin R. Nimocks
Attorney for *Amicus Curiae*

CONSENT OF THE PARTIES

Pursuant to Fed. R. App. 29(a), this brief is filed with the consent of all the parties.

Dated: May 28, 2009.

Alliance Defense Fund

____

Austin R. Nimocks
Attorney for *Amicus Curiae*

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS i

CONSENT OF THE PARTIES iii

TABLE OF CONTENTS..iv

TABLE OF AUTHORITIES v

INTERESTS OF *AMICUS CURIAE* 1

INTRODUCTION 1

ARGUMENT 2

I. The History of Adoption Statutes in America Demonstrates that their Purpose was to Imitate the Natural Family..................................2

A. The Social Background of Adoption Statutes. 2

B. The Passage of Adoption Statutes. 4

C. The Adoption Statutes in the State Courts.................................6

II. The Historic Purpose of Louisiana's Adoption Statute is Imitating the Natural Mother-Father-Child Family. 9

III. Recognition of Adoptions by Same-Sex Couples is at Odds with the Historic Purpose of Adoption in America............................11

CONCLUSION 12

CERTIFICATE OF COMPLIANCE...13

CERTIFICATE OF SERVICE 14

TABLE OF AUTHORITIES

Cases:

Alexander v. Gray,
181 So. 639 (La . Ct. App. 1938)....................9

Batcheller-Durkee v. Batcheller,
97 A. 378 (R.I. 1916)....................6

Bilderback v. Clark,
189 P. 977 (Kan. 1920)....................7

Burk v. Burk,
192 N.W. 706 (Mich. 1923)....................6

Craft v. Blass,
__S.W. __, 8 Tenn. App. 498 (Tenn. App. 1928) 6

Crosby v. Harral,
4 P.2d 655 (N.M. 1931)....................6

Cunningham v. Lawson,
36 So. 107 (La. 1904)....................9

In re Brands' Estate,
95 So. 603 (La. 1923)....................9

In re Jobson's Estate,
128 P. 938 (Cal. 1912)....................7

In re Moran's Estate,
52 S.W. 377 (Mo. 1899)....................7

In re Rendell's Estate,
221 N.W. 116 (Mich. 1928)....................6

In re Santos' Estate,
195 P. 1055 (Cal. 1921)....................7

Meriwether v. Fourth & First Bank & Trust Co.,
285 S.W. 34 (Tenn. 1926)....................6

Miller v. Wick,
142 N.E. 490 (Ill. 1924)....................6

Preusse v. McLerran,
282 S.W. 293 (Tex. App. 1926)....................6

State in Interest of Latoya W.,
97-0695 (La. App. 4 Cir. 2/4/98); 706 So.2d 688 10

Succession of Hosser,
37 La. Ann. 839 (La. 1885) 9

Succession of Unforsake,
19 So. 602 (La. 1896) 9

Vidal v. Commagere,
13 La. Ann. 516 (La. 1858) 8, 9

Statutory Provisions and Court Rules:

La Child. Code Ann. art. 1198 (2009) 10, 11

La Child. Code Ann. art. 1221 (2009) 10

La Child. Code Ann. art. 1243 (2009) 10

Other Authorities:

Charles Loring Brace, *Address Upon the Industrial School Movement* (1857)........3

Elizabeth S. Cole, *Adoption: History, Policy, and Program*, *in A Handbook of Child Welfare: Context, Knowledge and Practice* (Joan Laid & Ann Hartman eds., 1985) 2, 4, 8

Homer Folks, *The Care of Destitute, Neglected, and Delinquent Children* (1902) 3

La. Att'y Gen. Op. No. 06-0325 (Apr. 18, 2007) 10

Lisa K. Gold, *Who's Afraid of Big Government? The Federalization of Intercountry Adoption: It's Not as Scary as It Sounds*, 34 Tulsa L.J. 109 (1998) 8

Stephen B. Presser, *The Historical Background of American Adoption Law*, 11 J. Fam. L. 443 (1971) 2, 3, 4, 5

Lynn D Wardle, *A Critical Analysis of Interstate Recognition of Lesbigay Adoptions*, 3 Ave Maria L. Rev. 561 (2005) 1, 5, 10, 11

Lynn D. Wardle, *Parentlessness: Adoption Problems, Paradigms, Policies and Parameters*, 4 Whittier J. Child & Fam. Advoc. 323 (2005) 1, 4, 5

Lynn D. Wardle, *The "Inner Lives" of Children in Lesbigay Adoption: Narratives and Other Concerns*, 18 St. Thomas L. Rev. 511 (2005) 8

Camille S. Williams, *Family Norms in Adoption Law: Safeguarding the Bests Interest of the Adopted Child*, 18 St. Thomas L. Rev. 681 (2005) 5, 11

INTERESTS OF *AMICUS CURIAE*

Family Research Council ("FRC") is a nonprofit organization located in Washington, D.C. It exists to develop and analyze governmental policies affecting the family. FRC is committed to strengthening traditional families in America and advocates continuously on behalf of policies designed to accomplish that goal.

Louisiana Family Forum ("LFF) is a nonprofit, statewide research and education organization dedicated to being a voice for traditional families in Louisiana. Its mission is to persuasively present biblical principles in the centers of influence on issues affecting the family through research, communication and networking. LFF's members desire to both prevent further destruction of family values and encourage the return of those values to their rightful places.

INTRODUCTION

Forcing the State of Louisiana to recognize adoptions by same-sex couples is squarely at odds with the historic purpose of adoption in America: "the creation of family relationships that imitated and were intended to replicate the relationship that exists between parents and children in a birth (or natural) family." Lynn D Wardle, *A Critical Analysis of Interstate Recognition of Lesbigay Adoptions*, 3 Ave Maria L. Rev. 561, 564 (2005) (internal parentheses omitted). A birth family is self-evidently comprised of a father and a mother, not of two persons of the same-

sex. Accordingly, the traditional, imitative model of adoption that has long been the "dominant paradigm for adoption" in America "preclude[s] adoption by same-sex parents." *Id.* at 565; *see also* Lynn D. Wardle, *Parentlessness: Adoption Problems, Paradigms, Policies and Parameters*, 4 Whittier J. Child & Fam. Advoc. 323, 337 (2005).

ARGUMENT

I. The History of Adoption Statutes in America Demonstrates that their Purpose was to Imitate the Natural Family.

A. The Social Background of Adoption Statutes.

Modern, American adoption law has its roots in the early nineteenth century. Stephen B. Presser, *The Historical Background of American Adoption Law*, 11 J. Fam. L. 443, 472 (1971). Up until about 1830, dependent and neglected children in America were cared for almost exclusively in almhouses. *Id.*; *see also* Elizabeth S. Cole, *Adoption: History, Policy, and Program*, *in A Handbook of Child Welfare: Context, Knowledge and Practice* 639 (Joan Laid & Ann Hartman eds., 1985). Almhouses were public institutions where dependent children "were poorly cared for by women consigned to prison terms." Presser, *supra*, at 473. The children often "were taken ill with opthalmia or other contagious diseases, and very many died." *Id.*

Those children fortunate enough to reach between the ages of seven and fourteen were given by the almhouses in "indenture" or "apprenticeship." *Id.* at 472; *see also* Cole, *supra*, at 639. The children learned a trade, worked on a local farm, labored in the workplace, or served a family. Presser, *supra*, at 456-58. Summing up the situation, one historian wrote, "[F]ew persons, if any, will dissent from the statement that the direct care of destitute children by American municipalities prior to 1875 was, as a rule, a pitiful failure." Homer Folks, *The Care of Destitute, Neglected, and Delinquent Children* 33 (1902); *see also* Presser, *supra*, at 473.

Inspired by the plight of these children, philanthropists, largely motivated by their religious beliefs and ideals, founded private agencies, such as the Children's Aid Societies, to educate and care for dependent children. *Id.* Men like the Reverend Charles Loring Brace, the founder of the New York Children's Aid Society, sought to "minister[] to the . . . needs of indigents," hoping to teach "consciously or unconsciously, refinement, purity, self-sacrifice and Christian obligation." *Id.* at 481; *see also* Charles Loring Brace, *Address Upon the Industrial School Movement* 9 (1857). Brace exhorted his workers that though they might see little progress as they attempted to help the children of "crime and penury," still "in distant lonely convict cells, in far-away prison-courts, in gloomy

halls of justice, your deeds of goodness and Christian love have penetrated and bear pleasant fruit." Presser, *supra*, at 481; *see also* Brace, *supra*, at 19.

Around 1850, private agencies "began to be founded with the avowed purpose of placing younger children in a suitable family environment." Presser, *supra*, at 474. With the increase in immigration in the middle of the nineteenth century, the burden of caring for children in a long-term institutional care environment, and then placing them out for service, simply became impossible to manage. *Id.* at 479-80; *see also* Cole, *supra*, at 639. The private agencies, thus, started placing children in foster homes "where they would be treated more like members of the family than like servants." Presser, *supra*, at 488. For these agencies, "the effort to provide a proper family atmosphere became paramount." *Id*.

B. The Passage of Adoption Statutes.

By the late, middle nineteenth century, the phenomenon of children in adopted homes became common in America. *Id.*; *see also* Cole, *supra*, at 639. As a result, there was increased pressure on the States to pass laws regulating and insuring the legal relations between adopted children and their natural and adopted parents. Presser, *supra*, at 488-89. This pressure eventually led to the passage of adoption statutes and the start of modern, American adoption law. *Id.*; *see also*

Cole, *supra*, at 639; Wardle, *Parentlessness*, *supra*, at 337. Massachusetts passed the first such adoption statute in 1851; the last statute passed in 1929. *Id.*; *see also* Cole, *supra*, at 639; Presser, *supra*, at 465.

"The purpose of American adoption statutes passed in the middle of the nineteenth century was to provide for the welfare of dependent children." Presser, *supra*, at 453. The statutes "attempt[ed] to replicate in the lives of individual children something akin to the institution which predates it: the biological or conjugal family." Camille S. Williams, *Family Norms in Adoption Law: Safeguarding the Bests Interest of the Adopted Child*, 18 St. Thomas L. Rev. 681, 682 (2005). The Massachusetts adoption statute, for instance, provided that once an adoption was approved by the probate court, the adopted child became "to all intents and purposes" part of the adopters' family. Presser, *supra*, at 453. Accordingly, modern American adoption statutes established an "imitative model" of adoption. Wardle, *Parentlessness*, *supra*, at 337 ("By the early part of the twentieth century, child-welfare-oriented, imitative had become the dominant paradigm for adoption, replacing the old adult-centered, property- or status-transmission focus."). The goal was to imitate, or replicate, the natural family as best as possible for the adopted child. Wardle, *Critical Analysis*, *supra*, at 564; *see also* Williams, *supra*, at 681-82.

C. The Adoption Statutes in the State Courts.

The State courts interpreting these early adoption statutes reaffirmed their purpose of replicating the natural family. For instance, the Tennessee Supreme Court declared: "The manifest intention of our adoption statutes was to make the relation between the adopting parent and the adopted child precisely what it would have been had there been a lawful and natural relation of parent and child." *Meriwether v. Fourth & First Bank & Trust Co.*, 285 S.W. 34 (Tenn. 1926); *see also Craft v. Blass*, __S.W. __, 8 Tenn. App. 498 (Tenn. App. 1928) (same).

The Michigan Supreme Court held that "[i]n passing the adoption statute the Legislature evidently intended, insofar as language would make it possible, to place the adopted child in the family in the same position as the natural child." *Burk v. Burk*, 192 N.W. 706, 707 (Mich. 1923). *See also In re Rendell's Estate*, 221 N.W. 116, 118 (Mich. 1928) ("the legal status of an adopted child . . . is made identically the same as though it had been born to the adoptive parents in lawful wedlock").

The Rhode Island Supreme Court asserted, "The primary purpose of adoption statutes is said to be to promote the welfare of the child by securing for it the benefits of a home and parental care." *Batcheller-Durkee v. Batcheller*, 97 A.

378, 379 (R.I. 1916). *See also Preusse v. McLerran*, 282 S.W. 293, 295 (Tex. App. 1926) (same); *Crosby v. Harral*, 4 P.2d 655, 656 (N.M. 1931) (same).

The Illinois Supreme Court maintained that "the purpose of the Illinois statute of adoption is to give the adopted child the same status as if it had been born to the adoptive parents in lawful wedlock." *Miller v. Wick*, 142 N.E. 490, 491 (Ill. 1924). Reviewing its state's adoption statute, the Missouri Supreme Court ruled that "[t]he intention of the statute is . . . to establish as nearly as possible the relation of parent and child." *In re Moran's Estate*, 52 S.W. 377, 378 (Mo. 1899). According to the Kansas Supreme Court, "[i]t is elementary law that the aim and end of adoption statutes is the welfare of children. The theory of the adoption statute is that such welfare will be best promoted by giving an adopted child the status of a natural child." *Bilderback v. Clark*, 189 P. 977, 980 (Kan. 1920).

The California Supreme Court explained:

> The main purpose of adoption statutes is the promotion of the welfare of children, bereft of the benefits of the home and care of their real parents, by the legal recognition and regulation of the consummation of the closest conceivable counterpart of the relationship of parent and child. While a guardian of the person of a minor is charged with a high duty and serious responsibility in the care of his ward, nevertheless the status of guardian and ward falls short of the close approximation to the relationship of parent and child which is attainable through actual adoption, culminating, as it does, in the child becoming a member, to all intents and purposes, of the family of the foster parents.

In re Santos' Estate, 195 P. 1055, 1057 (Cal. 1921). *See also In re Jobson's Estate*, 128 P. 938, 940 (Cal. 1912) ("The whole purpose and object of the adoption statute is to create, artificially, the relation of parent and child, to provide a status controlling them for their joint lives.").

Thus, the adoption statutes passed by the States in the late nineteenth and early twentieth centuries were "designed to provide the closest legal imitation of the natural mother-father-child home for children who were without parents." Lynn D. Wardle, *The "Inner Lives" of Children in Lesbigay Adoption: Narratives and Other Concerns*, 18 St. Thomas L. Rev. 511, 519 (2005). No doubt the adoption statutes also secondarily fulfilled the aspirations of childless parents for children, but this was not their primary purpose. One scholar put it this way:

> American adoption was not created to solve the stigma and burden of an out-of-wedlock pregnancy. Nor was it intended to ease the pain of infertility by providing children for infertile couples. That adoption practices did both was merely a fortuitous side effect of the primary purpose of adoption: to provide children with nurturant environments in the care of legally recognized parents whose custody, control, responsibilities, and rights were assured.

Cole, *supra*, at 640; *see also* Lisa K. Gold, *Who's Afraid of Big Government? The Federalization of Intercountry Adoption: It's Not as Scary as It Sounds*, 34 Tulsa L.J. 109, 110 (1998) ("Modern adoption and particularly international adoption, now serves a more reciprocal function of meeting the needs of children who would

otherwise be without homes and families, as well as the adults who would otherwise be without children.").

II. The Historic Purpose of Louisiana's Adoption Statute is Imitating the Natural Mother-Father-Child Family.

Even prior to the passage of a formal adoption statute, the Louisiana Supreme Court understood the purpose of adoption to be replicating the natural family. In *Vidal v. Commagere*, 13 La. Ann. 516 (La. 1858), the court considered a dispute over whether an adopted child should inherit from her adoptive father. In construing the words "to adopt" from a private adoption act, the court explained, "[W]e find them to mean to take a stranger into one's family, as son and heir; to take one who is not a child and treat him as one, giving him a title to the privileges and rights of a child." *Id.* at 517 (internal quotations omitted). The court ultimately held that the adopted girl should inherit from her adoptive father, because when she was adopted "the relationship of parent and child with all the consequences of that relationship [was] understood." *Id.* at 519.

Louisiana passed its first adoption statute in 1865. *See Alexander v. Gray*, 181 So. 639, 642 (La . Ct. App. 1938); *In re Brands' Estate*, 95 So. 603, 604 (La. 1923) ("By Act 48 of 1865, the Legislature . . . authorized adoption which was by means of judicial proceedings."). The Louisiana courts interpreted the statute such that an "act of adoption conferred on the adopted child, all the rights constituting

the relation of parent and child and all the consequences flowing from that relationship." *Succession of Hosser*, 37 La. Ann. 839, 840 (La. 1885). According to the Louisiana Supreme Court, "persons brought into a family by adoption obtain[ed] the same rights as if they had been born in that family." *Succession of Unforsake*, 19 So. 602, 603 (La. 1896). "The relationship" was for "all intents and purposes the same as existed between natural father and son." *Id. See also Cunningham v. Lawson*, 36 So. 107, 108 (La. 1904) (holding that adoption creates "the relationship of parent and child, with all the consequences of that relationship").

This same basic adoption policy continues today. The Louisiana Children's Code provides that only a single person, eighteen years or older, or a married couple jointly may petition to adopt a child. La Child. Code Ann. art. 1198 (2009) (restricting adoption through agencies); La Child. Code Ann. art. 1221 (2009) (same restriction for private adoptions); La Child. Code Ann. art. 1243 (2009) (similar restriction for intra-family adoptions). The State's historic desire to replicate a natural family means that the Children's Code makes no provision allowing for two *unmarried* persons to adopt a child jointly. *See* La. Att'y Gen. Op. No. 06-0325 (Apr. 18, 2007); *see also State in Interest of Latoya W.*, 97-0695, p. 13 (La. App. 4 Cir. 2/4/98); 706 So.2d 688, 694 (considering modern adoption

statute and concluding that "the purpose of adoption" is "the establishment of a new legal family").

III. Recognition of Adoptions by Same-Sex Couples is at Odds with the Historic Purpose of Adoption in America.

Adoption by same-sex couples "was unknown historically." Wardle, *Critical Analysis*, *supra*, at 565. The natural or biological family is self-evidently comprised of a mother and father, not two persons of the same-sex. Accordingly, legal recognition of adoptions by same-sex couples flatly contradicts the purpose for which the States passed adoption laws in the first place—replicating the natural family. *Id.* ("The imitative model of adoption obviously precluded adoption by same-sex parents.).

While many states, including Louisiana, recognize adoptions by single persons, these adoptions are still consistent with the States' aim of attempting to imitate the natural family for adopted children. *See*, *e.g.*, La Child. Code Ann. art. 1198 (2009). The adoptive parents are to serve as "replacements for the child's own biological parents. The approval of an unmarried individual [is] considered part of the conjugal family norm, simply with one of the parents not yet 'replaced.'" Williams, *supra*, at 682. A single person "remains eligible to marry," and, thus, there always remains the possibility that the natural family will be completed. Wardle, *Critical Analysis*, *supra*, at 614. However, no such possibility

exists with same-sex couples. A same-sex couple can never constitute a natural or biological family.

The nature of adoption by same-sex couples "differs so radically from traditional imitative adoption" that mandatory recognition of such adoptions would require Louisiana to jettison the historic purpose of its adoption laws. *Id.* at 615. Because recognition of adoptions by same-sex couples is so fundamentally at odds with the longstanding purpose of American adoption laws, Louisiana should not be forced to recognize Appellees' adoption.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* FRC and LFF respectfully urges the Court to rule in favor of the Appellant, and, as requested by Appellant, reverse the lower court and enter a judgment dismissing Appellees' full faith and credit claim, and to remand for further proceedings in the district court.

Dated: May 28, 2009.

Alliance Defense Fund

____

Austin R. Nimocks
Attorney for *Amicus Curiae*

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

- This brief contains 2,680 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

- This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003, in Times New Roman 14-point font.

Dated: May 28, 2009.

Alliance Defense Fund

____

Austin R. Nimocks
Attorney for *Amicus Curiae*

CERTIFICATE OF SERVICE

I hereby certify that two (2) true and correct copies of the foregoing Brief Of *Amicus Curiae* Family Research Council and the Louisiana Family Forum in Support of Defendant-Appellant, as well as a computer disc containing an electronic version of the brief in Adobe Portable Document Format, were sent by Overnight Delivery to Counsel for Appellants and Counsel for Appellees as follows:

Regina O. Matthews
Spencer R. Doody
338 Lafayette Street
New Orleans, LA 70130
(504) 581-9065
(504) 581-7635 (fax)

Kenneth D. Upton, Jr.
Lambda Legal Defense and Education Fund, Inc.
3500 Oak Lawn Ave., Suite 500
Dallas, TX 75219
(214) 219-8585
(214) 219-4455 (fax)

James D. “Buddy” Caldwell
Kyle Duncan
Louisiana Department of Justice
P.O. Box 94005
Baton Rouge, LA 70804-9005
(225) 326-6765
(225) 326-6797 (fax)

Carol L. Haynes
Louisiana Department of Health and Hospitals

1010 Common Street, Suite 800
New Orleans, LA 70112
(504) 599-1434
(504) 599-1432 (fax)

Dated: May 28, 2009.

Alliance Defense Fund

____
Austin R. Nimocks
Attorney for *Amicus Curiae*