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; and 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 AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF LOUISIANA IN SUPPORT OF PLAINTIFFS-APPELLEES OREN ADAR AND MICKEY RAY SMITH AND IN SUPPORT OF AFFIRMANCE

KATIE M. SCHWARTZMANN
ACLU FOUNDATION OF LOUISIANA
P.O. Box 56157
New Orleans, LA 70156

KENNETH Y. CHOE
JAMES D. ESSEKS
ACLU FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2627

COUNSEL FOR AMICI CURIAE ACLU AND ACLU OF LOUISIANA

CORPORATE DISCLOSURE STATEMENT

Neither Amicus Curiae is a nongovernmental corporate entity with a parent corporation or a publicly held corporation that owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE AND SOURCE OF AUTHORITY TO FILE

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 500,000 members. The American Civil Liberties Union of Louisiana (ACLU of Louisiana) is its Louisiana affiliate. Their members share a commitment to the defense of the rights that are guaranteed by the Constitution. Among the most fundamental of these rights is the constitutional right to equal protection of the laws. The ACLU and the ACLU of Louisiana regularly appear before courts in Louisiana and other jurisdictions in cases involving this constitutional right, including those involving children of gay and lesbian parents. In light of the important equality considerations presented by this case, Amici Curiae respectfully submit that they are well-positioned to assist this Court in its analysis of an issue central to this appeal.

Pursuant to Federal Rule of Appellate Procedure 29(a), Amici Curiae file this brief with the consent of all parties.

ARGUMENT

Unlike other Louisiana-born children, Louisiana-born children who are adopted in other jurisdictions by unmarried couples are denied a birth certificate that identifies each of their legal parents. As a result, these children are disadvantaged in each of the numerous and various contexts in

which a birth certificate is commonly used to confirm the legal relationship between a parent and a child. Moreover, unlike other Louisiana-born children, these children suffer dignitary harm occasioned by the refusal of the State to conform its vital records to reflect their relationships with their legal parents.

Amici Curiae endorse each of the statutory and constitutional theories that Appellees advance in support of their challenge to Appellant's discriminatory practice. Pursuant to Fifth Circuit Rule 29.2, however, Amici Curiae limit their brief to an amplification of a portion of the equal protection argument that Appellees offer in the alternative to their full faith and credit argument. While Amici Curiae agree with Appellees that the proper level of scrutiny to be applied to the classification at issue is a heightened level of scrutiny, they submit this brief solely to explain further why the classification at issue fails even rational basis review.

In doing so, Amici Curiae note that it is immaterial whether Appellant's discriminatory practice purports to be rooted in notions of state public policy or in the language of a state statutory provision. Either way, invidious discrimination among Louisiana-born children may not stand under the federal equal protection guarantee.

I. TO SURVIVE RATIONAL BASIS REVIEW, DENYING COMPLETE AND ACCURATE BIRTH CERTIFICATES TO CHILDREN ADOPTED BY UNMARRIED COUPLES MUST RATIONALLY FURTHER A LEGITIMATE GOVERNMENTAL INTEREST.

Rational basis review is not a toothless standard. To the contrary, the Supreme Court has repeatedly demonstrated that, even under the lowest level of scrutiny, it will not hesitate to strike down an invidiously discriminatory classification. See, e.g., Romer v. Evans, 517 U.S. 620 (1996) (discrimination against gay individuals); Quinn v. Millsap, 491 U.S. 95 (1989) (discrimination against individuals who did not own real property); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) (discrimination against mentally retarded individuals); Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985) (discrimination against newer residents); Williams v. Vermont, 472 U.S. 14 (1985) (discrimination against individuals who purchased automobiles before becoming residents); Metro. Life Ins. Co. v. Ward, 470 U.S. 869 (1985) (discrimination against out-of-state companies); Zobel v. Williams, 457 U.S. 55 (1982) (discrimination against newer residents); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973) (discrimination against unrelated households).

To survive rational basis review, the *distinction* that a law makes between two classes must *rationally* further a *legitimate* governmental

interest: "When a state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment. Generally, a law will survive that scrutiny if the *distinction rationally* furthers a *legitimate* state purpose." Hooper, 472 U.S. at 618 (footnote omitted) (emphases added); see also Zobel, 457 U.S. at 60 (same).

Significantly, the proper inquiry is not whether *the law* rationally furthers a legitimate governmental interest. Rather, it is whether *the distinction that the law makes between two classes* does so. Romer, 517 U.S. at 632 ("[E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between *the classification adopted* and the object to be attained.") (emphasis added); Heller v. Doe ex rel. Doe, 509 U.S. 312, 320 (1993) ("[A] classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between *the disparity of treatment* and some legitimate governmental purpose.") (emphasis added).

The case law confirms that this is so. For example, in Cleburne, a municipality imposed a special use permit requirement on group homes for the mentally retarded, but not on apartment houses, boarding and lodging houses, fraternity and sorority houses, dormitories, apartment hotels,

hospitals, sanitariums, and nursing homes. Cleburne, 473 U.S. at 436 n.3. The Supreme Court framed its inquiry as follows: "May the city require the permit for [the group home for the mentally retarded] when other care and multiple-dwelling facilities are freely permitted?" Id. at 448. In doing so, the Court focused its analysis, not on the rationale for imposing the special use permit requirement on group homes for the mentally retarded, but rather on the rationale for distinguishing between group homes for the mentally retarded and similar types of facilities: "[The] difference [between mentally retarded individuals and other individuals] is largely irrelevant unless the [group home for the mentally retarded] and those who would occupy it would threaten legitimate interests of the city in a way that other permitted uses such as boarding houses and hospitals would not." Id. In the end, the Court struck down the classification, recognizing that, while the municipality's concerns (e.g., flooding, irresponsibility, size of facility, number of residents, population density, traffic congestion, fire, noise, and danger) might explain why the municipality imposed the special use permit requirement on group homes for the mentally retarded, they did not explain why the municipality did not also do so on similar types of facilities, which presented the same concerns. Id. at 449-50.

Similarly, in Williams, a state imposed a tax on individuals who had purchased an automobile in, and had paid a tax to, another jurisdiction if they had done so before becoming a resident, but not if they had done so after becoming a resident. In striking down the classification, the Supreme Court recognized that, while the state's interests (e.g., ensuring that those who use the state's highways contribute to their maintenance and improvement) might explain why the state imposed the tax on those purchasing an automobile before becoming a resident, they did not explain why the state did not also do so on those purchasing an automobile after becoming a resident, who implicated the same interests. Williams, 472 U.S. at 25-27. "The fact that it may [have been] rational or beneficent to spare some the burden of double taxation [did] not mean that the beneficence [could] be distributed arbitrarily." Id. at 27.[1]

In this case, the proper inquiry is whether denying complete and accurate birth certificates to Louisiana-born children adopted by out-of-state unmarried couples – while granting complete and accurate birth certificates to other Louisiana-born children (e.g., those adopted by married couples,

[1] See also, e.g., Hooper, 472 U.S. at 621 (state's interest in assisting veterans applied equally to older residents and newer residents); Ward, 470 U.S. at 882-83 (state's interest in encouraging investment applied equally to in-state companies and out-of-state companies).

those born to unmarried couples) – rationally furthers a legitimate governmental interest.

II. DENYING COMPLETE AND ACCURATE BIRTH CERTIFICATES TO CHILDREN ADOPTED BY UNMARRIED COUPLES DOES NOT RATIONALLY FURTHER ANY INTEREST IN PREVENTING CHILDREN FROM BEING PARENTED BY GAY (OR UNMARRIED) COUPLES.

Even where a proffered interest is a legitimate one, the classification must *rationally* further the proffered interest. As the Supreme Court has admonished, "[the government] may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." Cleburne, 473 U.S. at 446 (citations omitted); see also Romer, 517 U.S. at 632 (a classification may not be "so discontinuous with the reasons offered for it that [it] seems inexplicable by anything but animus toward the class it affects"); id. at 635 (a classification may not be "so far removed from [the proffered] justifications that we find it impossible to credit them"). Moreover, "even the standard of rationality . . . must find some footing in the realities of the subject addressed by the [law]." Heller, 509 U.S. at 321; see also Romer, 517 U.S. at 635 (a classification may not be "divorced from any factual context from which we could discern a relationship to legitimate state interests"). Thus, even under rational basis

review, the Court has repeatedly struck down classifications where the classification did not sufficiently further the proffered interest.

Not surprisingly, the Supreme Court has repeatedly found that a classification does not sufficiently further an interest where the classification does not further the interest at all. For example, in Hooper, the state granted a tax exemption for Vietnam War Veterans to pre-1976 residents. Significantly, the law was enacted in 1981. As the Court readily recognized, under the circumstances, the classification did not further the state's interest in encouraging Vietnam War veterans to become residents at all. Hooper, 472 U.S. at 619-20; see also, e.g., Williams, 472 U.S. at 24-25, 26 (discriminating against individuals who purchased automobiles before becoming residents did not further interest in protecting state revenue and local merchants or interest in taxing in-state purchases by out-of-state residents at all); Zobel, 457 U.S. at 61-63 (discriminating against newer residents did not further interest in encouraging individuals to become residents or interest in conserving limited resources at all).

In addition, the Supreme Court has repeatedly found that, even where a classification *arguably* furthers an interest, the classification does not *sufficiently* further the interest where the relationship between the classification and the interest is too attenuated to be credited. For example,

in Quinn, a municipality excluded individuals who did not own real property from the opportunity to serve on a municipal board. Although discriminating against individuals who did not own real property arguably furthered the municipality's interest in ensuring that each member of a municipal board was knowledgeable of and invested in community affairs, the relationship between the classification and the interest was too attenuated to be credited. Quinn, 491 U.S. at 108-09; see also, e.g., Romer, 517 U.S. at 635 (state denied non-discrimination protections to gay individuals; although classification arguably furthered interest in respecting associational rights and interest in conserving limited resources, relationship between classification and interests was too attenuated to be credited); Hooper, 472 U.S. at 621-22 (state granted tax exemption for Vietnam War veterans to pre-1976 residents; although classification arguably furthered interest in assisting Vietnam War veterans who were residents during Vietnam War, relationship between classification and interest was too attenuated to be credited); Moreno, 413 U.S. at 536-38 (government denied food stamps to unmarried households; although classification arguably furthered interest in preventing fraud, relationship between classification and interest was too attenuated to be credited).

The record in this case confirms that Appellant has disavowed any interest in preventing children from being parented by gay couples.[2] ROA 489. Even if it were otherwise, however, and even if such an interest were a legitimate one, denying complete and accurate birth certificates to children adopted by unmarried couples would not rationally further any interest in preventing children from being parented by gay (or unmarried) couples. Indeed, it would not further such an interest at all. A child adopted by a gay (or unmarried) couple will be parented by the gay (or unmarried) couple whether or not his or her birth certificate lists each of his or her legal parents. Accordingly, the relationship between, on the one hand, denying complete and accurate birth certificates to children adopted by unmarried couples and, on the other hand, any interest in preventing children from being parented by gay (or unmarried) couples is too attenuated to be credited.

---

[2] Amici Curiae note that, over the past twenty-five years, methodologically sound scientific study has uniformly and conclusively shown that children of gay parents fare just as well as children of heterosexual parents, a scientific fact recognized by every mainstream national child welfare organization. See, e.g., American Psychological Association, Lesbian & Gay Parenting (2005), apa.org/pi/lgbc/publications/lgparenting.pdf; American Academy of Pediatrics, Technical Support: Coparent or Second-Parent Adoption by Same-Sex Parents, 109 Pediatrics 341 (2002), *available at* aappolicy.aappublications.org/cgi/reprint/pediatrics;109/2/341.pdf; see also, e.g., Dep't of Human Servs. v. Howard, 238 S.W.3d 1, 6-7 (Ark. 2006).

Because denying complete and accurate birth certificates to children adopted by unmarried couples does not rationally further any interest in preventing children from being parented by gay (or unmarried) couples, it serves only to express disapproval of gay (or unmarried) couples, which is an inherently illegitimate interest. See § III infra; see also Romer, 517 U.S. at 634 ("[L]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.").

III. EXPRESSING MORAL DISAPPROVAL OF GAY (OR UNMARRIED) COUPLES IS NOT A LEGITIMATE INTEREST.

The federal equal protection guarantee "requir[es] that [a] classification bear a rational relationship to an *independent* and legitimate [governmental] end." Romer, 517 U.S. at 633 (emphasis added). Where the classification and the interest are essentially one and the same, "it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit." Id. at 635.

The Supreme Court has long held that discrimination for its own sake is an inherently illegitimate interest:

> [I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare [governmental] desire to harm a politically unpopular group cannot constitute a legitimate governmental interest. As a result, a purpose to discriminate against [a class of individuals]

> cannot, in and of itself and without reference to (some independent) considerations in the public interest, justify [a law].

Moreno, 413 U.S. at 534-35 (internal quotation omitted). Because "classifications [may] not [be] drawn for the purpose of disadvantaging the group burdened by the law," Romer, 517 U.S. at 633 (citation omitted), "[t]he [government] must do more than justify its classification with a concise expression of an intention to discriminate," Plyler v. Doe, 457 U.S. 202, 227 (1982) (citation omitted). Thus, "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable . . . are not permissible bases for treating [one class] differently from [another class]." Cleburne, 473 U.S. at 448.

This fundamental principle applies with equal force where a classification reflects the negative attitudes of the general public, as opposed to those of the government itself:

> [T]he [government] may not avoid the strictures of [the Equal Protection] Clause by deferring to the wishes or objections of some fraction of the body politic. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.

Id. (quotation omitted). "[D]enying a [benefit] based on such vague, undifferentiated fears is . . . permitting some portion of the community to validate what would otherwise be an equal protection violation." Id. at 449.

In this case, Appellant has not proffered any interest in expressing moral disapproval of gay couples. ROA 489. Nor could she. Lawrence v. Texas, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring) ("Moral disapproval of [gay individuals] cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be drawn for the purpose of disadvantaging the group burdened by the law.") (quotation omitted); Romer, 517 U.S. at 635 (a law may not "classif[y] homosexuals . . . to make them unequal to everyone else."). Proffering an interest in expressing moral disapproval of gay (or unmarried) couples would be tantamount to saying "we disfavor gay (or unmarried) couples because we disfavor gay (or unmarried) couples." It follows from such patent arbitrariness and irrationality that expressing moral disapproval of gay (or unmarried) couples is an inherently illegitimate interest.

Because denying complete and accurate birth certificates to children adopted by unmarried couples serves only to express disapproval of gay (or unmarried) couples, it does not further any legitimate interest.

CONCLUSION

For the foregoing reasons, Amici Curiae respectfully request that this Court affirm.

Respectfully submitted,

/s/ Katie M. Schwartzmann
Katie M. Schwartzmann
Louisiana Bar No. 30295
ACLU Foundation of Louisiana
P.O. Box 56157
New Orleans, LA 70156

Kenneth Y. Choe
James D. Esseks
ACLU Foundation
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2627

Counsel for Amici Curiae
ACLU and ACLU of Louisiana

CERTIFICATE OF SERVICE

I hereby certify that, on July 7, 2009, I sent two paper copies and one electronic copy of Brief of Amici Curiae American Civil Liberties Union and American Civil Liberties Union of Louisiana in Support of Plaintiffs-Appellees Oren Adar and Mickey Ray Smith and in Support of Affirmance by United States mail to each of the following sets of counsel:

James D. Caldwell
Kyle Duncan
Louisiana Department of Justice
P.O. Box 94005
Baton Rouge, LA 70804

Carol L. Haynes
Louisiana Department of Health and Hospitals
1010 Common Street, Suite 800
New Orleans, LA 70112

Counsel for Defendant-Appellant Darlene W. Smith

Regina O. Matthews
Spencer R. Doody
Martzell & Bickford
338 Lafayette Street
New Orleans, LA 70130

Kenneth D. Upton, Jr.
Lambda Legal Defense and Education Fund, Inc.
3500 Oak Lawn Avenue, Suite 500
Dallas, TX 75219

Counsel for Plaintiffs-Appellees Oren Adar and Mickey Ray Smith

William C. Duncan
Marriage Law Foundation
1868 North 800 East
Lehi, UT 84043

Counsel for Amicus Curiae Family Watch International

Brian W. Raum
Austin R. Nimocks
Timothy J. Tracey
Alliance Defense Fund
15100 North 90th Street
Scottsdale, AZ 85260

Counsel for Amici Curiae Family Research Council and Louisiana Family Forum

Richard A. Bordelon
Ralph J. Aucoin
Todd R. Gennardo
Denechaud & Denechaud, LLP
1010 Common Street, Suite 3010
New Orleans, LA 70112

Counsel for Amicus Curiae Louisiana Conference of Catholic Bishops

Stephen M. Crampton
Mary E. McAlister
Liberty Counsel
100 Mountain View Road, Suite 2775
Lynchburg, VA 24502

Mathew D. Staver
Anita L. Staver
Liberty Counsel
1055 Maitland Center Commons, 2nd Floor
Maitland, FL 32751

Counsel for Amicus Curiae Liberty Counsel

/s/ Katie M. Schwartzmann
Katie M. Schwartzmann
Louisiana Bar No. 30295
Counsel for Amici Curiae
ACLU and ACLU of Louisiana

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 2,728 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font size and Times New Roman type style.

/s/ Katie M. Schwartzmann
Katie M. Schwartzmann
Louisiana Bar No. 30295
Counsel for Amici Curiae
ACLU and ACLU of Louisiana