

FORUM FOR EQUALITY PAC,
a registered Louisiana Political Action Committee,
LAURENCE E. BEST, JEANNE M. LeBLANC
and WILLIAM SCHULTZ

versus

CITY OF NEW ORLEANS and THE
HONORABLE W. FOX McKEITHEN,
in his official capacity as SECRETARY OF
STATE OF THE STATE OF LOUISIANA
only and not individually

CIVIL DISTRICT COURT

PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 2004-11325

DIV. "A", SECTION 5

**BRIEF OF *AMICI CURIAE*,
HON. HEULETTE "CLO" FONTENOT, State Senator, HON. JOHN J. HAINKEL, JR.,
State Senator, HON. A.G. CROWE, State Representative, HON. STEVE J. SCALISE,
State Representative, LOUISIANA FAMILY FORUM, LOUISIANA FAMILY FORUM
ACTION, and AMERICAN FAMILY ASSOCIATION OF NEW ORLEANS,
IN SUPPORT OF DEFENDANTS' EXCEPTIONS AND IN OPPOSITION TO THE
PLAINTIFFS' CLAIM FOR PRELIMINARY INJUNCTION**

MAY IT PLEASE THE COURT:

INTRODUCTION

This brief *amicus curiae* is respectfully submitted in support of the defendant, THE HONORABLE W. FOX McKEITHEN, Secretary of State of the State of Louisiana, and the defendants' exceptions, and in opposition to the plaintiffs' Petition for Declaratory Judgment and Injunctive Relief. *Amici* endorse and support the arguments set forth in the briefs filed herein by the Louisiana Department of Justice, and present this brief for the limited purpose of supplying additional arguments as to why the plaintiffs could not possibly succeed on the merits of their claim. This brief addresses only Count I of the plaintiffs' Memorandum in Support of Petition for Declaratory Judgment and Injunctive Relief (hereinafter "Plaintiffs' Brief").

Amici, Hon. Heulette "Clo" Fontenot and Hon. John J. Hainkel, Jr., members of the Louisiana State Senate, and Hon. A.G. Crowe and Hon. Steve J. Scalise, members of the Louisiana House of Representatives, are all co-authors of the proposed constitutional amendment at issue in this suit. *Amici*, Louisiana Family Forum, Louisiana Family Forum Action, and American Family Association of New Orleans, are all not-for-profit organizations that work to support and defend the traditional models for marriage and family in Louisiana. Thus, all participating *amici* have a vested and personal interest in the outcome of this litigation.

ARGUMENT

Count I of Plaintiffs' Brief sets forth the extraordinary and legally unsupported proposition that the Louisiana Legislature may not seek to offer an amendment to the Louisiana

Constitution with regard to the State's definition of marriage. The plaintiffs' suggestion is wholly without merit. As the plaintiffs themselves acknowledge, the Louisiana Supreme Court has long held that, to the contrary, "it is an elementary proposition of constitutional law, that the Constitution may be amended by the people in whole or in part." *Police Jury of Parish of Washinton v. All Taxpayers, Property Owners and Citizens of Industrial District No.1 of Parish of Washington*, 278 So.2d 474, 478 (La. 1973). Citing cases going back nearly one hundred years, the Court affirmed: "There is, in fact, no limitation upon the power of the people of Louisiana to amend their Constitution in any respect, **providing that the amendment does not conflict with the Constitution of the United States.**" *Id.* (emphasis added). Because the proposed amendment at issue does not conflict with the United States Constitution, the plaintiffs cannot support their unfounded claims.

I. THERE IS NO FEDERAL CONSTITUTIONAL RIGHT TO SAME-SEX "MARRIAGE."

The institution of marriage predates the constitutions of the State of Louisiana and of the United States. What marriage "is" has been established by hundreds of years of common law, civil law, case law, statutory law, and constitutional law.

Historically, only marriage between a man and a woman has been recognized and fostered by the state because that relationship is the fundamental building block of western civilization. No major civilization in the history of the world has expanded the definition of marriage to include any combination *but* man and woman. *See generally*, Peter Lubin and Dwight Duncan, *Follow the Footnote or The Advocate as Historian of Same-Sex Marriage*, 47 Cath. U.L. Rev. 1271, 1324 (1998).

In *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed for want of a substantial federal question*, 409 U.S. 810 (1972), the United States Supreme Court considered and rejected the claims by two men that Minnesota's exclusion of same-sex couples from marriage violated the Ninth and Fourteenth Amendments to the United States Constitution. The Court upheld the Minnesota Supreme Court's ruling that there is no fundamental right to same-sex "marriage" under the Ninth Amendment or the Due Process Clause of the Fourteenth Amendment, and that excluding same-sex couples from marriage does not constitute irrational or invidious discrimination under the Equal Protection Clause of the Fourteenth Amendment. *See Baker*, 191 N.W.2d at 186-87. The Minnesota Supreme Court had ruled that the state's

definition of marriage “does not offend the First, Eighth, Ninth, or Fourteenth Amendments to the United States Constitution.” *Id.* at 187.

Prior to 1988, plaintiffs like those in *Baker* had an automatic right to Supreme Court review “[b]y appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution . . . of the United States, and the decision is in favor of its validity.” 28 U.S.C. § 1257(2) (as amended July 29, 1970, Pub. L. 91-358, 84 Stat. 590). On direct appeal, the Supreme Court “dismissed for want of a substantial federal question.” *Baker*, 409 U.S. at 810.

The United States Supreme Court’s dismissal of the *Baker* appeal for want of a substantial federal question was a decision on the merits that is binding on all other courts considering the same issues:

Summary affirmances and dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from. *They do prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions.*

Mandel v. Bradley, 432 U.S. 173, 176 (1977) (per curiam) (emphasis added).¹ The Supreme Court ruled that the three-judge district court panel erred in assuming that a summary affirmance by the Court necessarily adopts the reasoning of the opinion below. *Id.* at 176. However, the Court reiterated its prior holding “that lower courts are bound by summary actions on the merits by this Court,” (quoting *Hicks v. Miranda*, 422 U.S. 332, 344 (1975)), and clarified that the precedential value is limited to “the precise issues presented and necessarily decided” *Mandel*, 432 U.S. at 176.²

The Jurisdictional Statement in the appeal from the Minnesota Supreme Court’s rejection of the claims of a right to same-sex “marriage” raised the issues of whether excluding same-sex couples from marriage:

deprives appellants of liberty and property in violation of the due process and equal protection clauses [and] . . . constitutes an unwarranted invasion of the privacy in violation of the Ninth and Fourteenth Amendments.

¹ The elimination of the Court’s appellate jurisdiction in 1988 does not change the applicability of this rule to current cases. 16B Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* § 4014 (2003) (“Abolition of the appeal jurisdiction does not change this rule. Lower courts must continue to honor it”).

² In *Hicks*, the Court ruled that “(v)otes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case” *Hicks*, 422 U.S. at 344 (quoting Justice Brennan in *Ohio ex rel. Eaton v. Price*, 360 U.S. 246, 247 (1959); also citing R. Stern & E. Gressman, *Supreme Court Practice* 197 (4th ed. 1969) (“The Court is, however, deciding a case on the merits, when it dismisses for want of a substantial question”); C. Wright, *Law of Federal Courts* 495 (2d ed. 1970) (“Summary disposition of an appeal, however, either by affirmance or by dismissal for want of a substantial federal question, is a disposition on the merits”).

Appellants' Jurisdictional Statement at 11, 18, *Baker v. Nelson* (Feb. 11, 1972). The appeal directly raised a claim of a fundamental right to marry "fully protected by the due process and equal protection clauses of the Fourteenth Amendment." *Id.* at 11 (citing *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Meyer v. Nebraska*, 262 U.S. 535 (1923)). Their right-to-privacy argument relied upon *Griswold*, *Loving*, and *Boddie*. *Id.* at 18-19. The Supreme Court's dismissal of the appeal for want of a substantial federal question was a rejection of the merits of these claims. There is no federal due process, equal protection, or privacy right to same-sex marriage in the Ninth or Fourteenth Amendments to the U.S. Constitution. Courts are "not free to disregard this pronouncement." *Hicks*, 422 U.S. at 344.

The courts that have discussed the nature of the dismissal in *Baker* have recognized that it was a decision on the merits and binding on other courts. See *McConnell v. Noonan*, 547 F.2d 54, 56 (8th Cir. 1976) ("the Supreme Court's dismissal of the appeal for want of a substantial federal question constitutes an adjudication of the merits which is binding on lower federal courts"); *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980) (Supreme Court's dismissal of *Baker* appeal was "an important adjudication on the merits"), *aff'd on other grounds*, 673 F.2d 1036, 1039 n.2 (9th Cir.) (noting that the Supreme Court's dismissal of the *Baker* appeal "operates as a decision on the merits"), *cert. denied*, 458 U.S. 1111 (1982); *In re Cooper*, 187 A.D.2d 128, 134 (N.Y. 1993) (dismissal in *Baker* "is a holding that the constitutional challenge was considered and rejected") (quoting trial court opinion with approval).

The United States Supreme Court's recent decision in *Lawrence v. Texas* clearly stated that the case did "not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Lawrence v. Texas*, 123 S. Ct. 2472, 2484 (2003). Justice Scalia's dissenting opinion, which suggested that the majority's rationale could lead to same-sex "marriage," does not overrule *Baker*.³ Indeed, no court has held that *Lawrence* requires same-sex "marriage," and two post-*Lawrence* decisions have rejected same-sex "marriage." See *Standhardt v. Super. Ct.*, 77 P.3d 451, 460 & n.14 (Ariz. Ct. App. 2003) (rejecting claim that *Lawrence* requires same-sex "marriage"); *Lewis v. Harris*, 2003 WL 23191114 (N.J. Super., Nov. 5, 2003).

³ In fact, no one cited *Baker* in the *Lawrence* briefing because the case did not raise a question about marriage.

Federal law and the laws of every state in the Union currently retain the definition of marriage that "is as old as the book of Genesis." *Baker*, 191 N.W.2d at 186. Plaintiffs cannot claim in good faith that the United States Supreme Court has held this definition to be unconstitutional. Thus, plaintiffs cannot in any way support a claim that the proposed amendment at issue in the present case conflicts with the United States Constitution. Again, as the plaintiffs have acknowledged, the Louisiana Supreme Court has consistently held that absent such a conflict, "there is no limitation upon the power of the people of Louisiana to amend their Constitution in any respect." *Police Jury of Parish of Washington*, 278 So.2d at 478.

II. THE PROPOSED AMENDMENT DOES NOT VIOLATE THE LOUISIANA CONSTITUTION'S DECLARATION OF RIGHTS.

Contrary to the plaintiffs' novel interpretations of the 1974 Louisiana Declaration of Rights, LA. CONST. ART. I, a plain reading of the Declaration shows that the plaintiffs could never prevail on the merits of their case. Plaintiffs' entire argument on Count I can be summarized by the following paragraph from page 6 of Plaintiffs' Brief:

This proposed constitutional amendment would create a new Section 15 in Article XII that would alienate and violate rights now in Article I. In attempting to do so, it violates the third sentence of Article I, Section 1, and the [1974 Constitutional Convention] Delegates' clear intent that nothing outside of Article I, even something elsewhere in the Constitution, can alienate or violate any right in Article I.

The glaring problem with the plaintiffs' argument here is that Article I *does not include any right to same-sex marriage*, nor any right not to be discriminated against on the basis of homosexuality or any of its incidents.

A. Louisiana's Equal Protection Clause Does Not Create a Right to Same-Sex Marriage.

The equal protection clause of the Louisiana Constitution, LA. CONST. ART. I, § 3, allows for the prohibition of same-sex marriage. It reads, simply:

No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations. Slavery and involuntary servitude are prohibited, except in the latter case as punishment for crime.

There is an express and important difference between the language of the second and third sentences of Section 3. While no law will *ever* constitutionally discriminate against a person because of his/her race or religion, Section 3 specifically *allows* for other types of "discrimination" in situations where the law in question is not "arbitrar[ly], capricious[]", or

unreasonabl[e].” For the reasons explained in the following sections of this brief, the proposed amendment fails none of those three tests.

Reference to the topics of public debate and the understanding, explanations, and discussions of the delegates at the Constitutional Convention of 1973, are valuable aids in ascertaining the intent and meaning of our constitution’s provisions. They are entitled to authoritative weight, and should not be shunned or lightly dismissed, especially as to any provision that is not entirely clear and unambiguous in its application. *See City of New Orleans v. Bd. Of Comm’rs of Orleans Levee District*, 93-0690 (La. 7/5/94), at pp. 14-18, 640 So.2d 237, 247-248; *New Orleans Firefighters Association et al. v. Allstate Ins. Co. et al.*, 97-2885 (La. 4/14/98) at pp. 18-21, 712 So.2d 46, 60-62; *Succession of Lauga*, 624 So.2d 1156, 1164-1165 (La. 1993); *Radiofone, Inc. v. City of New Orleans et al.*, *supra*, at p. 6, 630 So.2d at 698.

While LA. CONST. ART. I, § 3, is in no way ambiguous, the debate at the Constitutional Convention on its language is instructive. The transcripts of that debate show that the delegates clearly acknowledged their intention that homosexuals would not be allowed the same protections under state law as traditionally married couples. Delegate Arnette, in pointing out to the Convention that there were a number of classes of individuals that would not be protected under the committee’s explicit-listing proposal (which was ultimately adopted in substance with the addition of the words *arbitrarily, capriciously, and unreasonably*), explained: “[H]omosexuals, you are not protecting them in any way whatsoever...,” VI *Records of the Louisiana Constitutional Convention of 1973* (hereinafter simply “*Records of CC ‘73*”): *Convention Transcripts*, 38th Days Proceedings, August 29, 1973, at p. 1024.

By specific design of its authors, there is no provision of the 1974 Louisiana Constitution which would prohibit the people of Louisiana from prohibiting same-sex marriage, domestic partnerships, or other civil unions in any form—so long as these laws are not arbitrary, capricious, or unreasonable.

III. THE PROPOSED AMENDMENT SUPPORTS THE LOUISIANA CONSTITUTION’S DECLARATION OF RIGHTS.

The proposed amendment is *not* “arbitrary, capricious, or unreasonable” for the same reasons that it actually *further*s the Louisiana Constitution’s Declaration of Rights. LA. CONST. ART. I, § 1, entitled “Origin and Purpose of Government,” explains the foundational principles of our state government. It reads:

All government, of right, originates with the people, is founded on their will alone, and is instituted to protect the rights of the individual and for the good of the whole. Its only legitimate ends are to secure justice for all, preserve peace, protect the rights, and promote the happiness and general welfare of the people. The rights enumerated in this Article are inalienable by the state and shall be preserved inviolate by the state.

Contrary to the plaintiffs' assertions, the proposed amendment at issue in this case will advance and support these principles. It will allow the people of Louisiana to express "their will alone" on the subject of the definition of marriage, and provide them with an opportunity to "promote the happiness and general welfare" of this state "for the good of the whole." These ends will be accomplished because of the following reasons.

A. The Public and State Have a Strong Interest in Protecting Traditional Marriage.

The State of Louisiana, her people, and their governmental institutions have a strong interest in preserving the institution of marriage. The United States Supreme Court has historically affirmed that this interest must be honored. *Reynolds v. United States*, 98 U.S. 145 (1878), involved a First Amendment Free Exercise of Religion Clause challenge to a federal law banning bigamy, in what was then the Territory of Utah. The Court found the statute constitutional because the legislature had a compelling interest in preserving conventional marriage consisting of one man and one woman. *Id.* at 165. See *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 535 (1993) (citing *Reynolds*).

Justice O'Connor recently recognized that this same interest justifies preservation of traditional marriage against attacks by same-sex couples:

Texas cannot assert any legitimate state interest here, such as national security or preserving the traditional institution of marriage. Unlike the moral disapproval of same-sex relations – the asserted state interest in this case – other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.

Lawrence, 123 S. Ct. at 2487-88 (O'Connor, J., concurring). The following analysis demonstrates some of the many reasons why Louisiana has not only a reasonable, but a compelling interest in preserving traditional, opposite-sex marriage.

The public interest in marriage and family originates in the belief that the foundation for political society is in family organization. See A.E. HOEBEL, *THE LAW OF PRIMITIVE MAN*, 3-45 (1945). See also Paul J. Bohannon, *The Differing Realms of the Law*, 67 AM. ANTHROPOLOGICAL 33-42 (1965). That is, the state evolves out of and depends for its stability upon stable families. Both historically and structurally, marriage is the foundation of society. This truth has been

recognized by the United States Supreme Court, which has observed that marriage is a relationship that is “older than the Bill of Rights – older than our political parties, older than our school system,” *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965), and “fundamental to our very existence and survival.” *Loving v. Virginia*, 388 U.S. 1, 12 (1967). Indeed the Court regards “[m]arriage, as creating the most important relations in life, as having more to do with the morals and civilization of a people than any other institution. . . .” *Maynard v. Hill*, 125 U.S. 190, 205 (1888).

Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people, to a greater or less extent, rests.

Reynolds, 98 U.S. at 165-66.

Traditional, opposite-sex marriage is particularly important to democratic society because it is the “seedground for democracy.” Lynn D. Wardle, “*Multiply and Replenish*”: *Considering Same-Sex Marriage in Light of State Interests in Marital Procreation* 24 HARV. J. L. & PUB. POL’Y. 771, 780 (2001). See also Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy - Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 472-484 (1983) (“it is primarily through family bonds that both children and parents learn the attitudes and skills that sustain an open society”).

Traditional marriage has proven to be the safest repository of democratic values including tolerance, respect for others, and the balanced values of responsible individualism and commitment to the community. George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 JOURNAL OF LAW & POLITICS 581, 596 (1999). Opposite-sex marriage is a mediating institution that nurtures the values of unselfishness and liberty.

[R]eflection on the heterosexual norm directs our attention to certain social necessities: the continuation of human life, the place of difference within community, the redirection of our tendency to place our own desires first. These necessities cannot be supported by rational calculations of self interest alone; they require commitments that go well beyond calculations of personal satisfaction. Having and rearing children is among the most difficult of human projects. Men and women need all the support they can get to maintain stable marriages in which the next generation can flourish. Even marriages that do not give rise to children exist in accord with, rather than in opposition to, this heterosexual norm.

The Ramsey Colloquium, *The Homosexual Movement*, 41 First Things 15, 17-18 (1994).

Opposite-sex marriage is a uniquely beneficial arrangement, providing equity and security for individuals, family, and society. The security and stability of marriage as compared to same-sex relationships is indisputable.⁴ Opposite-sex marriage also fosters the value of equality. This is due in large part to the way in which the different sexes compliment one another.

Human society requires that we learn to value difference within community. In the complementarity of male and female we find the paradigmatic instance of this truth. . . . [It] invites us to learn to accept and affirm the natural world from which we are too often alienated. Moreover, in the creative complementarity of male and female we are directed toward community with those unlike us. In the community between male and female, we do not and cannot see in each other mere reflections of ourselves. In learning to appreciate this most basic difference, and in forming a marital bond, we take both difference and community seriously.

The Ramsey Colloquium, 41 FIRST THINGS at 17-18.

Marriages between one man and one woman are more likely than other types of families to have limited amounts of strife, the maximum amount of nurturing, the maximum amount of support, guidance, and leadership, and a very strong, intimate bond between parents and child. "Traditional marriage enriches the individuals who enter into it as well as their children and society generally. This effect satisfies even a strict test of liberal legitimacy because many benefits of marriage are not metaphysical but empirically verifiable. Married people live longer and enjoy better physical and psychological health and greater wealth." Dent, 15 JOURNAL OF LAW & POLITICS at 605.

These unique, invaluable contributions made to society by opposite-sex marriage necessitate and even compel the State to take steps to preserve it.

Spouses receive special consideration from the state, for marriage is a civil contract "of so solemn and binding a nature ... that the consent of the parties alone will not constitute marriage...; but one to which the consent of the state is also required." (*Mott v. Mott* (1889) 82 Cal. 413, 416.) Marriage is accorded this degree of dignity in recognition that "[the] joining of the man and woman in marriage is at once the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime." (*Marvin v. Marvin*, supra, 18 Cal.3d 660, 684).

Nieto v. City of Los Angeles, 138 Cal. App. 3d 464, 471 (1982).

⁴ An extensive survey of sexual practices found that for married couples, "a vast majority are faithful while the marriage is intact." Robert T. Michael, et al., SEX IN AMERICA: A DEFINITIVE SURVEY 89 (1994). "Among married people, 94 percent had one partner in the past year." *Id.* at 101. And the average marriage is long lasting. Sixty-seven percent of marriages last ten years, and 50 percent last more than twenty years. Matthew D. Bramlett et al., *First Marriage Dissolution, Divorce, and Remarriage: United States*, Advance Data No. 323 (Nat'l Center for Health Statistics) (May 31, 2001). However, investigators discovered that only 15 percent of homosexual men and 17.3 percent of homosexual women had ever had relationships that lasted more than 3 years. Only a few had stayed together for more than 10 years (4 out of 252 men and 1 out of 138 women). Marcel T. Saghir, M.D. and Eli Robins, M.D., MALE AND FEMALE HOMOSEXUALITY: A COMPREHENSIVE INVESTIGATION 57, Table 4.13; 225, Table 12.10 (1973).

Support of families that require unselfishness from its members is an absolute necessity in a society where the focus on self is forever increasing. “[M]arriage and the family are institutions necessary for our continued social well-being and, in an individualistic society that tends to liberation from all constraint, they are fragile institutions in need of careful and continuing support.” The Ramsey Colloquium, 41 FIRST THINGS at 17. Same-sex couples simply do not perform the same functions or provide the same benefits for society as conventional opposite-sex marriages. In view of the unique contributions that opposite-sex marriage makes to society, the State has a compelling interest in endorsing and preserving it to the exclusion of same-sex marriage which, as is demonstrated below, actually undermines opposite-sex marriage.

The fact that traditional heterosexual marriage has in recent years been ravaged by divorce does not detract from the many benefits it provides our society and the need for government to promote it.

Marriage and the family - Husband, wife, and children, joined by public recognition and legal bond - are the most effective institutions for rearing of children, the directing of sexual passion, and human flourishing in community. Not all marriages and families “work,” but it is unwise to let pathology and failure, rather than a vision of what is normative and ideal, guide us in the development of social policy.

The Ramsey Colloquium, 41 FIRST THINGS at 17. Recent attacks on conventional marriage only serve to underscore the State’s compelling interest in protecting it.

B. Same-Sex Marriage Would Undermine Traditional Marriage.

Allowing same-sex couples to marry will denigrate and undermine traditional, opposite-sex marriage in Louisiana. Such an attack on traditional marriage is precisely the type of “injury to a person or abuse of an institution the law protects” that the Supreme Court held government is authorized to avoid in *Lawrence v. Texas*, 123 S. Ct. at 2478. The acceptance of a philosophy that marriage is no longer relevant, that all “intimate” relationships are fungible, not only distorts the perception of reality, but threatens to warp the reality of marriage and family life for millions of adults and children. “To depict marriage as simply one of several alternative ‘lifestyles’ is seriously to undermine the normative vision required for social well-being.” The Ramsey Colloquium, 41 FIRST THINGS at 18.

In every society some people do not or cannot marry and bear and raise children. If they are viewed as unfortunate exceptions, the norm is not impaired. Recognition of gay marriages would mutilate the norm by granting, for the first time in history, equal honor to partnerships that inherently exclude the creation of life. The impact would be greater if, as seems likely, few gays elected to marry,

stay married, and adopted children. Like legalizing bestiality, cloning, and baby-selling, validation of gay marriage would not cause direct, proximate harm, but it would damage society by degrading the way we see and relate to others. Traditional marriage is a public good. That is, it benefits not only married couples and their children but also generates positive externalities, or benefits to others. Men and women who marry and stay married encourage others to do likewise, to the profit of society.

Dent, 15 JOURNAL OF LAW & POLITICS at 598-99. *See also id.*, at 615-639 (cataloguing numerous ways same-sex "marriage" would damage traditional marriage).

Advocates of same-sex marriage freely admit they want to radically change the institution of marriage.

Many advocates of same-sex marriage seek not to expand traditional marriage to gays but revolutionize the institution. [citing Nitya Duclos, *Some Complicating Thoughts on Same-Sex Marriage*, 1 Law & Sexuality 31 (1991)]. William Eskridge hopes gay marriage will dethrone the traditional family based on blood-relationships in favor of "families we choose." [citing WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE at 81; KATH WESTON, FAMILIES WE CHOOSE: LESBIANS, GAYS, KINSHIP 116 (1991)]. Michaelangelo Signorile urges activists "to fight for same-sex marriage and its benefits and then, once granted, redefine the institution of marriage completely, . . . to debunk a myth and radically alter an archaic institution The most subversive action lesbians and gay men can undertake . . . is to transform the notion of 'family' entirely." [Michelangelo Signorile, *Bridal Wave*, OUT, Dec.-Jan., 1994, at 161. See also Franklin Kameny, *Deconstructing the Traditional Family*, THE WORLD & I, Oct. 1993, at 393-95.] Urvashi Vaid wants to "assimilate the straight world to the gay world." [URVASHI VAID, VIRTUAL EQUALITY: THE MAINSTREAMING OF GAY AND LESBIAN LIBERATION 208 (1995)].

Dent, 15 JOURNAL OF LAW & POLITICS at 616-17.

The State of Louisiana and its citizens have a compelling interest in preserving the integrity of the marital union by making opposite-sex marriage the exclusive form of family relationship endorsed by the government. Loss of this exclusive endorsement will de-emphasize the importance of traditional opposite-sex marriage to society, weakening this vital institution, and placing our entire democratic system in jeopardy by eroding its foundation. "[T]he main consequence of recognizing same-sex marriage would not be a shift of some people to homosexual conduct, but the change in heterosexuals' no longer seeing traditional marriage as something special." Dent, 15 JOURNAL OF LAW & POLITICS at 614.

Even more troubling is the prospect that same-sex marriage would actually reduce some of the benefits, like an optimal parenting environment, provided by traditional marriage.

The further separation of procreation from marriage implicit in legalization of same-sex marriage would send a cultural message of parental disconnection from family duties that could further diminish the level of responsibility of absent parents. . . . The potential for increased social disorder if same-sex marriage is legalized is profound.

Wardie, 24 HARV. J. L. & PUB. POL'Y. at 798. *See also* Dent, 15 JOURNAL OF LAW & POLITICS at 601 (“As social esteem for marriage and parenting declines, so does citizens’ willingness to assume these roles. Validation of same-sex marriages would accelerate this decline”).

Proponents of same-sex “marriage” also make the more subtle argument that they simply want the same governmental benefits that heterosexual couples have access to through marriage. However, the deleterious effect on marriage is the same. Allowing same-sex couples to marry just for the benefits reduces marriage to an entity formed by persons wishing to exploit its advantages. The concept of marriage being the building block of society and the seed-ground of democracy will give way to an entity that is no more than a corporation, limited partnership, or other business organization formed for purely economic or liability reasons. This is completely contrary to the Supreme Court’s description of marriage as “more than a contract. It is not a mere matter of pecuniary consideration. It is a great public institution, giving character to our whole civil polity.” *Maynard v. Hill*, 120 U.S. at 213.

Furthermore, if support of traditional marriage creates inequities for same-sex couples, the same problem arises when other groups are excluded, like polygamists, endogamists, pedophiles, and even single individuals who do not want to marry. “Complete equality would require eliminating any legal preference for marriage and treating all individuals alike, regardless of whether they are married.” Dent, 15 JOURNAL OF LAW & POLITICS at 616. If Louisiana requires that marriage be redefined to include same-sex couples, then it must include other types of relationships - effectively mandating that marriage cannot be protected at all.

Louisiana has a compelling interest in protecting traditional marriage. It furthers this interest by refusing to endorse relationships like same-sex “marriage” that undermine it. The proposed constitutional amendment would not discriminate in a manner that is “arbitrary, capricious, or unreasonable.” Passing those three tests, there is no question that the amendment is appropriate as drafted. The plaintiffs thus have no merit to their case.

CONCLUSION

The plaintiffs’ novel interpretation of the Louisiana Declaration of Rights does not comport with statutes, case law, history, or common sense. The relevant precedents demonstrate that the proposed constitutional amendment does not violate equal protection. It will, however, be an important step in furthering the stated purposes of Louisiana government, and securing the health, welfare, and greater good of her people. For all of these reasons, the plaintiffs could not

prevail on the merits of this case, and their Petition for Declaratory Judgment and Injunctive Relief should be denied

Dated: August 12, 2004.

Respectfully submitted,

ALLIANCE DEFENSE FUND
Southeast Regional Service Center

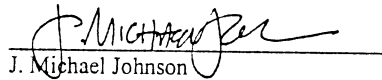


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Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I, the undersigned counsel, do hereby certify that a copy of the foregoing pleading has been served upon all counsel of record, via hand delivery, on this 13th day of August, 2004.


J. Michael Johnson

FORUM FOR EQUALITY PAC,
a registered Louisiana Political Action Committee,
LAURENCE E. BEST, JEANNE M. LeBLANC
and WILLIAM SCHULTZ

versus

CITY OF NEW ORLEANS and THE
HONORABLE W. FOX McKEITHEN,
in his official capacity as SECRETARY OF
STATE OF THE STATE OF LOUISIANA
only and not individually

CIVIL DISTRICT COURT

PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 2004-11325

DIV. "A", SECTION 5

**MOTION TO FILE BRIEF OF *AMICI CURIAE*,
HON. HEULETTE "CLO" FONTENOT, State Senator, HON. JOHN J. HAINKEL, JR.,
State Senator, HON. A.G. CROWE, State Representative, HON. STEVE J. SCALISE,
State Representative, LOUISIANA FAMILY FORUM, LOUISIANA FAMILY FORUM
ACTION, and AMERICAN FAMILY ASSOCIATION OF NEW ORLEANS,
IN SUPPORT OF DEFENDANTS' EXCEPTIONS AND IN OPPOSITION TO THE
PLAINTIFFS' CLAIM FOR PRELIMINARY INJUNCTION**

MAY IT PLEASE THE COURT:

1.

COME NOW *Amici*, Hon. Heulette "Clo" Fontenot and Hon. John J. Hainkel, Jr., members of the Louisiana State Senate, and Hon. A.G. Crowe and Hon. Steve J. Scalise, members of the Louisiana House of Representatives, Louisiana Family Forum, Louisiana Family Forum Action, and American Family Association of New Orleans, who move this Honorable Court to accept the filing of their attached brief *amici curiae*.

2.

The interests of these parties in this litigation are sufficient grounds for the granting of this motion. The above named legislators are all co-authors of the proposed constitutional amendment at issue in this suit. The above named not-for-profit organizations each work to support and defend the traditional models for marriage and family in Louisiana. Thus, all participating *amici* have a vested and personal interest in the outcome of this litigation.

3.

Amici respectfully submit that their brief will be of valuable assistance to the Court in deciding the issues presented

Respectfully submitted this 12th day of August, 2004.

ALLIANCE DEFENSE FUND
Southeast Regional Service Center



J. Michael Johnson
Bar Roll No. 26059
401 Market Street, Ste. 900
Shreveport, Louisiana 71101
Phone: (318) 459-2239
Fax: (318) 222-0458

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ORDER

After considering the motion by *amici curiae*, the Court ORDERS that the brief of *amici*, Hon. Heulette "Clo" Fontenot and Hon. John J. Hainkel, Jr., members of the Louisiana State Senate, and Hon. A.G. Crowe and Hon. Steve J. Scalise, members of the Louisiana House of Representatives, Louisiana Family Forum, Louisiana Family Forum Action, and American Family Association of New Orleans, be accepted and filed into the record of this case.

SIGNED on this ____ day of _____, 2004, at ____ o'clock __.m.

DISTRICT JUDGE