No. 24-441

In the Supreme Court of the United States

A.M.B. AND T.G.,

Petitioners,

v.

KELLY J. MCKNIGHT, PRESIDING JUDGE, CIRCUIT COURT OF WISCONSIN, ASHLAND COUNTY,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Wisconsin

BRIEF OF THE CATO INSTITUTE AND THE CENTER FOR THE RIGHTS OF ABUSED CHILDREN AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does a law fail rational basis review (and thus violate equal protection) when the only "conceivable justification" for the law—in this case promoting the best interests of children seeking adoption—is not plausibly advanced by the unequal treatment that the law imposes?

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies promotes the principles of constitutionalism that are the foundation of liberty. To those ends, Cato conducts conferences and publishes books, studies, and the annual Cato Supreme Court Review.

Cato is interested in this case because it presents a question of extraordinary importance regarding personal autonomy and the protection of children in the context of an equally momentous question about whether this Court's default standard of review does or does not entail any meaningful judicial scrutiny.

The Center for the Rights of Abused Children works in legislatures and courtrooms nationwide to protect the constitutional rights of abused children, each of whom deserves a safe and loving home. We protect children, change laws, and inspire others. The Center has shepherded dozens of reforms through state legislatures in a bipartisan manner to improve child welfare and educational outcomes. Our *pro bono* Children's Law Clinic provides free legal assistance to thousands of children and families annually, including direct representation and legal trainings.

This case is of special importance as it implicates our core mission—to ensure vulnerable children have

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[1] Rule 37 statement: All parties were timely notified before the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amici* funded its preparation or submission.

access to safe and loving homes through adoption. Children deserve timely permanency with safe and stable parents, which must not be frustrated by blanket prohibitions on who may adopt.

SUMMARY OF ARGUMENT

Three things are true about this case. First, like coffee, athletes, and beer, the rational basis test comes in different strengths. Second, which version of that test a court chooses to apply is often outcome-determinative, as it was here. And third, because children who bear the brunt of Wisconsin's self-defeating adoption policy cannot participate in the electoral process to which disappointed rational-basis litigants are invariably referred, the Wisconsin Supreme Court was wrong to apply such an insubstantial version of the rational basis test to the challenged law. This Court should correct that error and clarify that rational basis review—particularly when applied to laws that inflict as much gratuitous harm on a population of uniquely vulnerable, unenfranchised minors as this one does—is neither toothless nor a rubber-stamp, and does not compel judicial ratification of policies that nonsensically frustrate the very ends they seek to advance.

Wisconsin's desire to promote the best interests of adoption-seeking children is commendable. But the method it has chosen is neither a reasonable nor a plausible means of doing so and is therefore unconstitutional.

ARGUMENT

I. COURTS APPLY MULTIPLE VERSIONS OF THE RATIONAL BASIS TEST.

That the rational basis test comes in different strengths is a fact that cannot credibly be denied.[2] And it is equally true that which version of the rational basis test—"conceivable,"[3] "reasonable,"[4] "plausible,"[5]

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[2] *See, e.g.*, *U.S. R.R. Retirement Bd. v. Fritz,* 449 U.S. 166, 176 n.10 (1980) (collecting rational basis cases and noting that even "[t]he most arrogant legal scholar would not claim that all of these cases applied a uniform or consistent test under equal protection principles").

[3] *See, e.g.*, *Armour v. City of Indianapolis, Ind.*, 566 U.S. 673, 681 (2012) (noting that the "'burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it'") (quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993)); *see also FCC v. Beach Commc'ns*, 508 U.S. 307, 323 n.3 (1993) (Stevens, J., concurring) (observing that "[j]udicial review under the 'conceivable set of facts' test is tantamount to no review at all").

[4] *See* James M. McGoldrick, Jr., *The Rational Basis Test and Why It Is So Irrational: An Eighty-Five Year Retrospective*, 55 SAN DIEGO L. REV. 751, 758–71 (2018) (explaining difference between mere "rationality" review and more rigorous "reasonable basis test").

[5] *Fitzgerald v. Racing Ass'n of Cent. Iowa*, 539 U.S. 103, 107, 109–10 (2003) (repeatedly referring to "plausible" justifications and upholding differential tax law against equal-protection challenge on the grounds that it was supported by a "plausible policy reason"); *see also* Clark Neily, *One Test, Two Standards: The On-and-Off Role of "Plausibility" in Rational Basis Review*, 4 GEO. J.L.P.P. 199 (2006) (hereinafter Neily, *Two Standards*) (arguing that sometimes the rational basis test requires that laws be supported by a truly "plausible" policy justification, whereas other times a merely "conceivable" one will suffice).

"with bite," [6] "rubber-stamp," [7] "any piece of nonsense,"[8] etc.—a court chooses to apply generally determines the outcome of the case.[9]

Comparing this Court's decisions in *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955) and *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), provides a particularly vivid illustration of

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[6] *See, e.g.*, Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 18–19 (1972) (noting cases that "found bite in the equal protection clause after explicitly voicing the traditionally toothless minimal scrutiny standard"); *see also* Raphael Holoszyc-Pimentel, Note, *Reconciling Rational Basis Review: When Does Rational Basis Bite?*, 90 N.Y.U. L. REV. 2070 (2005) (hereinafter Holoszyc, *Reconciling*) (documenting nine cases applying rational basis with bite and describing "nine factors that appear to recur throughout these cases," including, as relevant here, political powerlessness, immutability, and inhibiting personal relationships).

[7] *E.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16–32, at 1610 (2d. ed. 1988) (describing rational basis test as a "virtual rubber-stamp of truly minimal review").

[8] Gideon Kanner, *[Un]equal Justice Under Law: The Invidious Disparate Treatment of American Property Owners in Takings Cases*, 40 Loy. L.A. L. REV. 1065, 1080 n.68 (2007) (quoting from transcript of a 2005 Ninth Circuit argument in which Judge William Fletcher posed a hypothetical question involving "space aliens" visiting earth in "invisible and undetectable craft" and asked government counsel whether that would supply a "conceivable" basis for upholding legislation under rational basis review; government counsel reluctantly averred that it would, to which Judge Fletcher responded, "Okay, in other words, 'conceivable' is '*any piece of nonsense is enough*'") (emphasis added).

[9] *See, e.g.*, Holoszyc, *Reconciling*, *supra* (collecting illustrative cases); Neily, *Two Standards*, *supra* (same).

the difference between the "any conceivable justification" and "truly plausible justifications" forms of rational basis review.

In *Cleburne*, the city council denied a special use zoning permit to a home for mentally disabled adults. *Id.* at 435. To justify that decision, the city offered a number of rationales that were simultaneously *conceivable* (in the sense that they were neither internally contradictory, nor contrary to the facts of the case, nor inconsistent with the known laws of the universe) but *implausible* (in that no serious person would believe the city's decision had anything to do with pursuing those ends). Among the justifications advanced by the city were (i) the possibility that children from a nearby middle school might harass residents of the proposed group home; (ii) the fact that the home would be located on a 500-year flood plain; and (iii) "doubts about the legal responsibility for actions which the mentally retarded [residents] might take." *Id.* at 449.

Rejecting those and other proffered justifications, the Court explained: "The short of it is that requiring the permit in this case appears to us to rest on in irrational prejudice against the mentally retarded." *Id.* at 450. Rather unusually for a rational basis case, the word "conceivable" appears nowhere in the majority or concurring opinions.

In his partial concurrence, Justice Marshall correctly observed that "the rational-basis test invoked today is most assuredly not the rational-basis test of *Williamson v. Lee Optical of Oklahoma, Inc.,* 348 U. S. 483 (1955)," in which the Court upheld a law requiring virtually all vision-related services to be performed by a state-licensed optometrist or ophthalmologist rather than opticians. *Id.* at 458 (Marshall, J., concurring in

part and dissenting in part). Oklahoma's justifications for its nakedly anticompetitive assault on the livelihood of opticians were no more credible than the City of Cleburne's equally pretextual rationalizations for denying permission to construct a group home for mentally disabled adults. The only credible explanation for why the former satisfied rational basis review while the latter did not was Justice Marshall's assertion that the *Cleburne* majority's approach represented a "'second order'" version of that test featuring "the sort of probing inquiry associated with heightened scrutiny." *Id*. at 458.

But with due respect to Justice Marshall, perhaps that overstates the case, given that the majority opinion in *Cleburne* featured none of the means-ends assessment that is integral to all forms of intermediate and strict scrutiny. Thus, instead of approving the City's conceivable—but plainly specious—explanations for its decision, the majority based its decision on the only truly plausible explanation, which was impermissible animus towards a particular class of people. And this is a thread that runs throughout the Court's rational basis precedents: namely, a willingness to accept conceivable-but-implausible explanations for unequal or freedom-restricting policies in some cases, but an insistence in other cases that the challenged policy *plausibly* advance a legitimate government end.[10]

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[10] *See, e.g.*, Neily, *Two Tests*, *supra* at 207–09 (discussing *Moreno v. Dep't of Ag.*, 413 U.S. 528 (1973), *Romer v. Evans*, 517 U.S. 620 (1996), and *City of Cleburne*, 473 U.S. at 432, as examples of rational basis cases requiring a plausible explanation for the government's unequal treatment of persons, as opposed to a merely conceivable one).

II. THE INSUBSTANTIAL TEST APPLIED HERE PRODUCES IRRATIONAL RESULTS BY UPHOLDING A LAW THAT FRUSTRATES ITS ONLY PLAUSIBLE END.

As demonstrated above, the Wisconsin Supreme Court had multiple versions of rational basis review to choose from, and it could (and, as further explained in Part III below, should) have applied a version of that test closer to *City of Cleburne*'s plausibility-based inquiry than the proverbial rubber-stamp of *Lee Optical*'s any-conceivable-explanation approach. Had it done so, the court might well have concluded, as Justice Karofsky suggests in her reluctant concurrence, that "the logical threads" underpinning Wisconsin's adoption law not only "begin to shred,"[11] but in fact come completely unraveled by the fundamentally irrational nature of a policy that systematically prevents public officials charged with acting in the best interests of children from actually doing so.

It may seem odd to suggest that a given law could satisfy *Lee Optical*'s "any conceivable justification" version of rational basis review while still being fundamentally irrational, but consider the following hypothetical variations on Wisconsin's adoption law:

- **Only convicted felons who have served time in prison may adopt children**. *Conceivable justification*: People who have been incarcerated have a superior ability to describe the hardship of that experience and more credibility when explaining to children

[11] App. 41a (Karofsky, J., concurring).

why they should do everything they can to avoid it.

- **Left-handed people may *not* adopt children.** *Conceivable justification*: Left-handed people are (or might be—it doesn't matter which for *Lee Optical* rational-basis purposes) more prone to accidents than right-handed people—especially when driving—thus putting adoptive children at greater risk of injury and death.[12]

- **Only college graduates may adopt children**. *Conceivable justification*: College graduates tend to have higher levels of education and income than people without college degrees, which may provide superior learning opportunities and greater material support for adopted children.

It seems self-evident that none of these hypothetical laws would, on balance, benefit the class of children seeking adoptions and would in fact be a manifestly *irrational* way for the government to pursue that policy goal. And yet, as with the law at issue in this case, it is "conceivable" that some hypothetical child

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[12] Stanley Coren, *Left-Handedness and Accident-Related Injury Risk*, 79 AM. J. PUB. HEALTH 1040 (Aug. 1989) (finding that left-handed people are more prone to accidents than right-handed people, particularly when driving motor vehicles), available at https://ajph.aphapublications.org/doi/abs/10.2105/AJPH.79.8.1040. Note that under the *Lee Optical* version of rational basis review, the facts upon which legislators base their policy decisions need not be true—just "conceivable." *See, e.g.*, *Beach Commc'ns*, 508 U.S. at 313 (explaining that a law satisfies equal protection so long as "there is any reasonably conceivable state of facts that could provide a rational basis for the classification").

might, at some point in time, benefit from being adopted by parents with college degrees, or less-accident-prone right-handed parents, or by a parent with the ability to describe, in particularly vivid and compelling terms, the reasons for avoiding a life of crime.

This case illustrates the fundamentally *irrational* nature of the *Lee Optical* rational basis test. As suggested by Justice Karofsky's concurrence, enforcement of Wisconsin's restrictive adoption law promoted neither "stability" nor the best interests of this particular child. As she explains, "[i]n cases like this where unmarried parents provide stability, there is no tolerance for any exception. And, as a result, children suffer." App. 43a. That is irrational, plain and simple.

Further underscoring the irrationality of both the challenged policy and the excessively deferential framework used to assess it, Wisconsin law allows people to adopt, regardless of their marital status. Wis. Stat. § 48.82(1). Unmarried partners of single parents are specifically prohibited from adopting their partners' children, no matter how much the best interests of the child would be served by allowing the adoption. Wis. Stat. § 48.82; *Georgina G. v. Terry M.* (*In re Angel Lace M.*), 516 N.W.2d 678, 681 (Wis. 1994) ("[B]efore we apply the best interests standard . . . we must determine whether Annette's proposed adoption of Angel satisfies the statutory requirements for adoption."). This approach is irrationally discriminatory against the very would-be parents who are most likely to provide stability and a loving environment for children of single parents.

The court below incorrectly concluded that this Court's precedents compelled the application of an irrationally insubstantial test instead of one that asks

whether the policy at issue *plausibly* advances a legitimate public purpose. Had the Wisconsin Supreme Court taken the latter approach—as it should have done for reasons explained below—its assessment of the challenged law might well have been different.

III. THIS CASE CALLS FOR APPLICATION OF "PLAUSIBLE" RATIONAL BASIS REVIEW, NOT "CONCEIVABLE."

To summarize the argument so far, *amici* have shown that there are multiple versions of the rational basis test, including one version that requires only "conceivable" justifications for discriminatory laws and another that requires a truly plausible justification that, at a minimum, does not frustrate the very ends the government claims to be pursuing—i.e., promoting the best interests of adoption-seeking children. *Amici* have also argued that this Court's precedents, taken together, empowered the Wisconsin Supreme Court to apply a version of rational basis review that would have avoided the irrational result of upholding a law that harms uniquely vulnerable children by categorically preventing government officials from allowing adoptions *that the government itself has found would be in a given child's best interest*.

What remains to be determined is whether the Wisconsin Supreme Court *should* have applied a more substantial version of the rational basis test than the one it did. The answer is yes, for two distinct reasons: first, because the harms of the challenged policy are borne primarily by a population of people who are excluded from the political process by virtue of their age; and second, because courts should be vigilant when the other branches of government arbitrarily choose to take a categorical approach to momentous questions—such as safeguarding the best interests of children—

that are normally (and wisely) made on an individualized basis.

A. It would be perverse to refer children who are harmed by Wisconsin's adoption policy to a ballot box they cannot access.

In denying relief to the aggrieved opticians in *Lee Optical*, this Court advised that "[f]or protection against such abuses by legislatures the people must resort to the polls, not the courts." *Lee Optical*, 348 U.S. at 488 (internal quotations marks omitted). Whatever the merits or demerits of that aphorism in the abstract, directing it to a population of adoption-seeking children who cannot vote and who lack the support and advocacy of two biological parents seems no more logically sound than directing it to a population of mentally disabled adults would have been in *Cleburne*.

Granted, the Wisconsin Supreme Court did not expressly refer the children who bear the brunt of the challenged policy's irrationality to the legislative process, but neither did it engage with this Court's tendency to apply a more substantial version of the rational basis test when a law singles out populations that are particularly powerless or particularly vulnerable—or, as in this case, both.

B. Courts should be particularly vigilant about guarding against irrational government policies where the best interests of children are concerned.

Besides their relative lack of political power by virtue of being too young to vote, the adoption-seeking children primarily affected by this policy are, as a class, more vulnerable to deleterious public policies be-

cause they have, by definition, fewer than two biological parents dedicated to protecting their interests. Those concerns are only heightened when the government undertakes some "intrusive regulation of the family," such as dictating which families may enjoy the additional legal, social, and emotional benefits of state-sanctioned adoption. In such cases, "the usual judicial deference to the legislature is inappropriate." *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977).

Moreover, unlike, say, the licensing of doctors or cosmetologists, governments do not typically make determinations affecting the familial and living arrangements of minor children on a categorical basis, such as completing a certain number of academic credits and passing or not passing a professional licensing examination. Such a rough-and-ready approach is inherently over- and underinclusive, but that is understood to be a reasonable tradeoff for efficiency and administrability in many public-policy settings. By contrast, governments typically go to significant lengths to provide an *individualized* determination of what living arrangement would genuinely promote the best interests of particular children given the unique circumstances of their lives and available alternatives. Wisconsin's adoption law represents a sharp and inexplicable departure from that historical tradition of tailor-made decisions for children's familial and living arrangements.

Of course, this is not to say the challenged law should have been subjected to strict or even intermediate scrutiny. Instead, the point is that given the nature of this policy and the special characteristics of those whom it most affects—including their lack of po-

litical power, lesser number of blood-relative advocates, and greater vulnerability—a more substantial form of rational basis review could and should have been applied than *Lee Optical*'s "conceivable-but-not-plausible" version.

CONCLUSION

Nothing in this Court's precedents commands the blinkered approach taken by the Wisconsin Supreme Court to assessing the constitutionality of the State's misguided and self-defeating adoption law. The petition should be granted and the case remanded for application of a standard of review that asks forthrightly whether that law *plausibly* promotes the best interests of adoption-seeking children.

Respectfully submitted,

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