No. 24-441

In the
Supreme Court of the United States

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

Petitioners,

v.

CIRCUIT COURT FOR ASHLAND COUNTY,
THE HONORABLE KELLY J. MCKNIGHT, PRESIDING,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In Wisconsin, a child is not eligible for adoption if he or she has an existing legal relationship with at least one parent. There is one exception to this rule: a child with one parent may be adopted by the spouse of that child's parent—i.e., by his or her stepparent. Wis. Stat. §§ 48.81, 48.92(2). The question presented is:

Do Wisconsin's statutes permitting stepparent adoption violate the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution because they are not broad enough to include other prospective adopters, such as nonmarital partners?

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INTRODUCTION

Adoption is not a fundamental right; it is a creation of statute. Accordingly, policy-driven choices regarding who is eligible to adopt and who is eligible to be adopted are made by legislative bodies through the democratic process. The judiciary affords these choices substantial deference.

Wisconsin's legislature has decided that when a child already has one parent, the child is eligible for adoption only by the parent's spouse—i.e., someone who has already committed themselves to the child's family unit through marriage. This is a common adoption eligibility standard. Nearly half of the states employ this same statutory scheme.

Despite its prevalence, Petitioners do not identify a single case—from any jurisdiction—in which a court determined that this statutory framework violates equal protection. That is unsurprising. This Court has repeatedly recognized the significance of marriage and its stabilizing influence on families, and a governmental benefit conditioned on marriage—here, an adoption opportunity—is not unconstitutional just because people in committed, nonmarital relationships do not also have access to it.

The Wisconsin Supreme Court unanimously upheld Wisconsin's stepparent adoption statutes as constitutional. Applying rational basis review, the court concluded that the classifications imbedded in the stepparent adoption statutes are rationally related to the state's interest in promoting stability for adoptive children through marital families.

The petition for a writ of certiorari does not satisfy this Court's traditional criteria for granting review for four primary reasons.

First, there is no split between jurisdictions for this Court to resolve. Wisconsin's Supreme Court unanimously upheld the challenged adoption statutes as constitutional, and no state or federal court has held otherwise. Indeed, the few courts that have considered equal protection challenges to similar stepparent adoption laws have reached the same result.

Second, the Wisconsin Supreme Court's decision follows directly from this Court's precedent, and there is no need for this Court to grant review to reaffirm what it has already held. At bottom, Petitioners' equal protection claim fails because legislative line-drawing is afforded particularly strong deference and the stepparent adoption statutes do not irrationally target them for disfavored treatment. The Wisconsin Supreme Court correctly applied the rational basis test to conclude that the legislature's decision to extend an adoption opportunity to stepparents, but not to other third parties, is rationally related to the state's interest in stability for adoptive children. Petitioners' contrary arguments all fail.

Third, Petitioners' strong personal stake in the outcome of this case does not create grounds for this Court's review. This is particularly true where Petitioners face no legal barrier to marriage and thus continue to retain the option of marrying one another

to avail themselves of the benefit of stepparent adoption, should they so choose.

Fourth, there is no need to clarify the minimum requirements of rational basis review and, if there were, this case would be a poor vehicle to do so. This case does not provide a useful opportunity for examining the outer bounds of rational basis review because the rational basis supporting the challenged statutes is readily apparent here. There is no difficult question for this Court to resolve.

The petition for certiorari should be denied.

STATEMENT OF THE CASE

In this case, an unmarried adult in Wisconsin wishes to adopt a child who is ineligible for adoption because the child already has a parent. And the stepparent adoption exception does not apply because he is not married to the child's parent. The trial court denied this proposed adoption because it is impermissible under Wisconsin law. Petitioners appealed, challenging the applicable statutes on equal protection grounds. The Wisconsin Supreme Court unanimously rejected the equal protection claim and affirmed the trial court.

I. Legal background.

1. Petitioners challenge the constitutionality of two Wisconsin statutes implicated by their proposed adoption: Wis. Stat. §§ 48.81 (who may be adopted) and 48.92(2) (effect of adoption).

A minor child in Wisconsin may be adopted under any of the following four scenarios: (1) the parental rights of both parents have been terminated; (2) both

parents are deceased; (3) the parental rights of one parent have been terminated and the other parent is deceased; and (4) "[t]he person filing the petition for adoption is the spouse of the child's parent with whom the child and the child's parent reside," and the child's other parent is deceased or had their parental rights terminated. Wis. Stat. § 48.81(1)–(4).[1] Thus, a child is eligible for adoption only if he or she has no legal parents, with one exception: a child with one parent may be adopted by the spouse of that child's parent—i.e., by his or her stepparent. *Id.*

Wisconsin Stat. § 48.92(2), in turn, permits a stepparent to adopt the minor child of his or her spouse while leaving the spouse's existing parental rights intact. Otherwise, an adoption severs "all the rights, duties, and other legal consequences" of the relationship between the child and his or her birth parents. Wis. Stat. § 48.92(2).

2. Together, Wis. Stat. §§ 48.81 and 48.92(2) are Wisconsin's statutes permitting "stepparent adoption"—the statutory procedure allowing a stepparent to adopt the children of their spouse while leaving the spouse's parental rights intact. *See* Margaret M. Mahoney, *Stepparents as Third Parties in Relation to Their Stepchildren*, 40 Fam. L.Q. 81, 85 (2006). All states have statutes permitting stepparent adoption, though the specific requirements differ. *Id.*

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[1] The remaining subsections of Wis. Stat. § 48.81 relate to the adoption of children born in foreign jurisdictions and are not relevant here. *See* Wis. Stat. § 48.81(5)–(6).

Some states also permit "second-parent adoption"—an analogous process by which a person may adopt the children of their nonmarital partner while leaving the nonmarital partner's parental rights intact. *See* Iśrael L. Kunin & James M. Davis, *Protecting Children and the Custodial Rights of Co-Habitants*, 22 J. Am. Acad. Matrim. Law. 29, 30, 37–38 (2009). Second parent adoption was particularly important in the years before *Obergefell v. Hodges*, 576 U.S. 644 (2015), because it allowed the nonbiological parent in a same-sex partnership to formalize their parental relationship with their children at a time when they were legally barred from marriage and thus barred from stepparent adoption. *See* Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 Harv. L. Rev. 1185, 1199–201 (2016).

At least twenty states, including Wisconsin, permit stepparent adoption but do not permit second parent adoption by other third parties, including nonmarital partners. (Pet. 14 n.7 (listing statutes).) In these states, stepparent adoption is the sole exception to the general rule that a child is not eligible for adoption if she has an existing legal relationship with at least one parent. (*Id.*)

3. Finally, adoption proceedings are created by statute and "unknown at common law." *In re Topel's Estate*, 32 Wis. 2d 223, 229, 145 N.W.2d 162 (1966). This means that the statutory requirements for an adoption must be met before it is legally permissible. *Id.*; *see also* Eugene M. Haertle, *Wisconsin Adoption Law and Procedure*, 33 Marq. L. Rev. 37, 37 (1949).

If the statutory eligibility requirements are met, the trial court next considers whether the proposed adoption would be in the child's best interests. *See* Wis. Stat. § 48.91(3). The court must find that the adoption would be in the child's best interests before granting the adoption; however, the fact that an adoption would be in the child's best interests does not, by itself, authorize the court to grant the adoption. *In Interest of Angel Lace M.*, 184 Wis. 2d 492, 505, 516 N.W.2d 678 (1994). A court's finding that the adoption would be in the child's best interests does not supersede the statutory eligibility requirements. *Id.*

II. Factual background.

M.M.C. is 16 years old and was born in November 2008. (Pet. Suppl. App. 83a.) Petitioner A.M.B. is M.M.C.'s biological mother. (*Id.* at 63a.) The parental rights of M.M.C.'s biological father were involuntarily terminated in 2022. (Pet. App. 4a; Pet. Suppl. App. 55a.)

Petitioner T.G. is A.M.B.'s significant other. (Pet. Suppl. App. 73a.) They are not married. (*Id.* at 64a–65a.)[2] T.G., A.M.B., and M.M.C. reside

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[2] Petitioners offer an additional fact that is not supported by the appellate record: that they have "chosen not to formally marry for deeply held personal reasons related in part to their own histories growing up in families with broken marriages." (Pet. 6.) The record contains no information as to why Petitioners have decided not to marry each other. This Court neither needs to nor should consider this unsupported factual assertion. *See, e.g.*, *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 235 (1990).

together as a family in the same household. (*Id.* at 73a.) T.G. has helped raise M.M.C., providing financial support and caring for her since she was a small child. (*Id.*)

A.M.B. and T.G. filed a joint petition for adoption requesting a court order allowing T.G. to adopt M.M.C. and become her second legal parent. (Pet. App. 4a.) The Ashland County Department of Human Services conducted a home study and recommended that the court grant the adoption in furtherance of M.M.C.'s best interests. (Pet. Suppl. App. 63a–93a.)

III. Procedural background.

The trial court held an adoption hearing on June 22, 2022. (*Id.* at 54a.) At the hearing, the court found that the proposed adoption was impermissible under Wisconsin's adoption statutes and thus the court had no authority to grant it. (*Id.* at 55a–57a.) In particular, none of the criteria for adoption under Wis. Stat. § 48.81 applied because M.M.C. has a legal parent, and T.G. is not "the spouse of the child's parent with whom the child and the child's parent reside." Wis. Stat. § 48.81(4). The court entered an order denying the petition for adoption. (Pet. Suppl. App. 63a–65a.) Petitioners appealed.

On appeal, Petitioners argued that Wis. Stat. §§ 48.81 and 48.92(2) are facially unconstitutional in violation of equal protection because they do not permit third parties such as T.G. to adopt the children of their nonmarital partners. (Pet. App. 5a, 7a.) Petitioners also urged the court to overturn a contrary

case—*Angel Lace M.*—in which the Wisconsin Supreme Court concluded that an earlier but substantially similar version of the governing statute did not violate equal protection. (*Id.* at 5a.)

Because the court of appeals has no authority to overturn a supreme court precedent, Petitioners filed a petition to bypass that court and proceed directly to the supreme court. (*Id.* at 5a–6a.) The bypass petition was granted. (*Id.* at 6a.)

On April 30, 2024, the Wisconsin Supreme Court unanimously rejected Petitioners' equal protection challenge to Wis. Stat. §§ 48.81 and 48.92(2) and affirmed the trial court's denial of the adoption petition. (*Id.* at 1a–22a.)

First, the court concluded that Wisconsin's legislative classifications restricting adoption eligibility are subject only to rational basis review because they neither infringe a fundamental right nor affect a protected class. (*Id.* at 8a–16a.)

Next, the court concluded that the classifications are rationally related to the state's interest in promoting stability for adoptive children. (*Id.* at 17a–22a.) Particularly, Wisconsin's adoption statutes provide "reasonable eligibility criteria to promote the government's interest in children being adopted into stable, permanent home environments." (*Id.* at 18a.) With respect to children who already have one parent, it makes sense to condition their second parent adoption on marriage because the marriage contract provides some level of assurance that the adopter will remain committed to the child's family unit and upbringing. (*Id.* at 19a.) The statutes

also advance the government's interest in promoting marriage, which in turn benefits children. (*Id.* at 20a–21a.)

Petitioners had argued, as they do here, that Wisconsin's adoption laws are irrational because they allow a single, unmarried adult to adopt a child without parents but do not allow an unmarried adult to adopt the child of his or her nonmarital partner. (*Id.*); *compare* Wis. Stat. § 48.82(1)(b), *with* Wis. Stat. § 48.81(4). The court disagreed, noting the difference in circumstances between a child with no parents and a child who already has permanency with one parent. (*Id.* at 21a.) The court reasoned that it is rational to permit a single adult to adopt a child without parents—notwithstanding the legislature's preference for marital families—because permanency in a single-parent household is preferable to the alternative: placement in foster care or another impermanent living arrangement. (*Id.*)

In sum, the court unanimously held that Wisconsin's stepparent adoption statutes satisfy the rational basis test because the classifications imbedded in those statutes rationally relate to the state's interest in promoting stability and security for adoptive children through marital families. (*Id.* at 20a–21a.)

Petitioners then filed a petition for a writ of certiorari with this Court.

REASONS FOR DENYING THE PETITION

Petitioners have not satisfied this Court's criteria for certiorari. There is no state or federal court split

for this Court to resolve. The Wisconsin Supreme Court's decision is based on a proper application of this Court's precedent. The interests at stake are not sufficiently important to warrant this Court's time and review. Lastly, there is no pressing need for this Court to clarify the minimum requirements of the rational basis test, and if there were, this case would be a poor vehicle for doing so.

I. No split of authority exists as to the constitutionality of stepparent adoption statutes.

Petitioners correctly observe that approximately half of the states have adoption laws like Wisconsin's: that is, laws that permit stepparent adoption but not second parent adoption by other third parties, including nonmarital partners. (Pet. 13–14.) Despite the prevalence of this statutory scheme, Petitioners do not identify a single case in which a court found that these laws violate equal protection. Without any disagreement among the state courts or lower federal courts as to the constitutionality of these laws, Petitioners' argument does not merit certiorari.

Further, the Wisconsin Supreme Court's decision is consistent with the decisions of the handful of other state courts that have considered equal protection challenges to similar adoption laws.

In *Adoption of T.K.J.*, a Colorado appellate court considered and rejected an equal protection challenge much like the one advanced by Petitioners. *See Matter of Adoption of T.K.J.*, 931 P.2d 488 (Colo. App. 1996). The petitioners in that case were a lesbian couple who each sought a "stepparent adoption" of the other's

child, even though they were not married to one another. *Id.* at 490. The trial court denied their adoption petitions. *Id.* at 491.

On appeal, the petitioners argued that the state's denial of the adoption petitions violated the children's constitutional rights to equal protection. *Id.* at 495. The Colorado appellate court disagreed and concluded that there was a legitimate governmental purpose underlying the absence of legislation permitting the adoption proposed by petitioners. *Id.* at 495–96. Particularly, the court concluded that the legislature may reasonably have determined that the state's interests in familial stability and the best interests of children would be furthered by limiting adoption to situations in which (1) the child has no legal parents; or (2) the adopting party is married to the child's custodial parent. *Id.* The court explained that lawmakers are "not required to choose between addressing all aspects of a situation or none of them, so long as the choice made by that legislative body is rational." *Id.*

A Pennsylvania appellate court reached parallel conclusions in *In re Adoption of R.B.F.* and *In re Adoption of C.C.G.*, rejecting out of hand similar equal protection challenges brought by unmarried same-sex partners to Pennsylvania's stepparent adoption laws. *In re Adoption of R.B.F.*, 2000 PA Super 337, ¶ 5 n.3, *vacated on other grounds by* 803 A.2d 1195 (Pa. 2002); *In re Adoption of C.C.G.*, 762 A.2d 724, 727 n.1 (Pa. Super. 2000), *vacated on other grounds by In re Adoption of R.B.F.*, 803 A.2d 1195.

Without any split of authority on a federal question, the petition should be denied.

II. The decision below follows directly from this Court's precedent and was correct on the merits.

The petition also does not warrant certiorari because the Wisconsin Supreme Court correctly applied this Court's precedent to reach the correct result. Petitioners offer no reason for this Court to use its time and resources to reaffirm what it has already said.

A. The Wisconsin Supreme Court rightly rejected Petitioners' scope-of-coverage challenge.

Petitioners do not allege that it is irrational for Wisconsin to permit stepparent adoption. Rather, they allege that the *absence* of legislation permitting second parent adoption by other prospective adopters is irrational. Particularly, Petitioners argue that Wisconsin's stepparent adoption laws must be expanded to cover not just spouses but also any unmarried person "in a committed relationship" with the child's parent. (Pet. 16.)

The Wisconsin Supreme Court rightly rejected Petitioners' scope-of-coverage challenge under this Court's precedent. This Court has described such challenges as "virtually unreviewable" given the special deference afforded to necessary legislative line-drawing. *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 316 (1993). Further, Wisconsin's stepparent adoption laws contain no textual classification targeting Petitioners for unfavorable treatment, making their equal protection claim

distinguishable from cases in which this Court did find a constitutional violation.

1. The Wisconsin Supreme Court quoted this Court to describe rational basis review as a "relatively relaxed standard" that reflects the judiciary's respect for the separation of powers and its recognition that "the drawing of lines [to] create distinctions is peculiarly a legislative task and an unavoidable one." (Pet. App. 8a (quoting *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 314 (1976)).) Indeed, legislative line-drawing is an "unavoidable components of most economic or social legislation," and the judicial restraint required by rational basis review has "added force" when evaluating it. *Beach Commc'ns, Inc.*, 508 U.S. at 316.

In *Beach Communications*, this Court emphasized that courts must be especially deferential to laws where "the legislature must necessarily engage in a process of line-drawing," such as determining which entities should receive beneficial treatment. *Id.* at 315 (quoting *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (rejecting an equal protection challenge to classifications for retirement benefits)). Because such line-drawing inevitably means that litigants with "an almost equally strong claim to favored treatment [will] be placed on different sides of the line," deciding where the line is best drawn "is a matter for legislative, rather than judicial, consideration." *Fritz*, 449 U.S. at 179 (citation omitted).

Wisconsin's stepparent adoption laws are an example of this type of legislative line-drawing. By carving out a narrow exception to the general rule, the laws provide a benefit—an adoption opportunity—to

one category of persons. Specifically, if a child has one parent and the child's other parent is deceased or had their parental rights terminated, only "the spouse of the child's parent with whom the child and the child's parent reside" is eligible to adopt the child. Wis. Stat. § 48.81(4). This classification reflects the legislature's policy judgment regarding the category of persons who are sufficiently committed to the child's existing family unit—i.e., the child and the child's parent—such that permitting a second parent adoption would likely advance the child's best interests.

The legislature's need "to draw the line somewhere" when deciding who is eligible to adopt a child who already has one parent "renders the precise coordinates of the resulting legislative judgment virtually unreviewable." *Beach Commc'ns, Inc.*, 508 U.S. at 316. This is because "the legislature must be allowed leeway to approach a perceived problem incrementally." *Id.* It is permissible for legislative reform to "take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind," and "neglecting the others." *Id.* (quoting *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955)). Except where there is "invidious discrimination," this type of incremental legislation does not run afoul of the equal protection clause. *Id.* (quoting *Williamson*, 348 U.S. at 489).

2. Petitioners' legal theory collapses under the application of these principles. When a child has only one parent, it makes sense to allow her to be adopted by the spouse of her parent. Petitioners' complaint is that stepparent adoption laws do not go far enough. They want the laws in Wisconsin to be *expanded* so that they have access to second parent adoption, too.

But this begs the question: how, exactly, should the laws be expanded? To permit second parent adoption by any third party with a parent-like relationship with the child, or only spouses and unmarried partners in "committed relationships"? (Pet. 17.) If it's the latter, how should "committed" be defined in this context? As this Court has already made clear, these are legislative questions that should be resolved through the democratic process and by careful policy analysis, not by judicial decree. *See Beach Commc'ns, Inc.*, 508 U.S. at 314. This Court need not and should not grant review here just to restate this principle.

3. Relatedly, Petitioners' legal theory rests on the premise that Wisconsin's adoption laws impose a "ban on adoption by unmarried people in committed relationships," thereby presenting "a classic legislative classification amenable to federal equal protection analysis." (Pet. 16.) That is incorrect. The statutes do not define, classify, or target unmarried people in committed relationships at all. The classifications imbedded in Wisconsin's stepparent adoption statutes include only (1) stepparents (eligible for stepparent adoption); and (2) everyone else (not eligible for stepparent adoption). *See* Wis. Stat. §§ 48.81, 48.92(2).

Petitioners' inability to point to a textual classification that singles them out for unfavorable treatment makes this case distinguishable from the equal protection cases on which they rely. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620 (1996); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008). In each of these cases, the challengers pointed to a textual classification

that explicitly singled them out for unfavorable treatment. *See Romer*, 517 U.S. at 624; *Lawrence*, 539 U.S. at 562–63; *Merrifield*, 547 F.3d at 982. And in each case, the relief granted was to declare the challenged provision unenforceable. *See Romer*, 517 U.S. at 636; *Lawrence*, 539 U.S. at 578–79; *Merrifield*, 547 F.3d at 992.[3]

Here, far from singling out Petitioners for disfavored treatment, Wisconsin's adoption statutes treat them the same as every other person who does not fall into the narrow category of persons with access to stepparent adoption—that is, every person who is not "the spouse of [a] child's parent with whom the child and the child's parent reside." Wis. Stat. § 48.81(4). And because there is no textual classification discriminating against them, there is nothing that could be struck from Wisconsin's adoption laws to grant Petitioners the relief they are seeking; only the creation of a new law could authorize their proposed adoption.

Petitioners are effectively asking this Court to rewrite Wisconsin's adoption laws under the guise of an equal protection challenge and substitute their policy judgment for that of the Wisconsin Legislature. This Court should not do so.

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[3] *City of Cleburne* likewise involves an example of the government unconstitutionally singling out a group for disfavored treatment, albeit not with a legislative classification. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985). There, this Court determined that a group home had been unconstitutionally singled out for disfavored treatment when the city required it to obtain a special use permit based solely on the fact that it would be housing intellectually disabled adults. *Id.* at 447–48.

B. The Wisconsin Supreme Court applied the correct standard of review.

The Wisconsin Supreme Court properly applied this Court's precedent to conclude that rational basis review applies to Petitioners' equal protection claim because the challenged statutes neither infringe on a fundamental right nor disadvantage a protected class.[4]

Petitioners do not dispute that rational basis review applies. Instead, they suggest that the court should have applied the rational basis test with "more probing scrutiny," given the type of interests involved. (Pet. 4.) Petitioners' argument for a more rigorous form of rational basis review does not enjoy support from any of this Court's precedent.

1. The Wisconsin Supreme Court described rational basis review as a deferential test under which the court will uphold legislative classifications so long as the legislature has reasonable and practical grounds for them. (Pet. App. 17a.) A classification does not offend the Constitution simply because it "is not made with mathematical nicety or because in practice it results in some inequality." (*Id.* (quoting *Dandridge v. Williams*, 397 U.S. 471, 485 (1970)).)

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[4] All federal circuit courts considering the question have likewise concluded that adoption is not a fundamental right. *See, e.g.*, *Adar v. Smith*, 639 F.3d 146, 162 (5th Cir. 2011); *Lindley for Lindley v. Sullivan*, 889 F.2d 124, 131 (7th Cir. 1989); *Lofton v. Sec'y of Dep't of Child. & Fam. Servs.*, 358 F.3d 804, 811–12 (11th Cir. 2004).

2. Petitioners do not identify any specific error in the Wisconsin Supreme Court's articulation of the rational basis test. Rather, Petitioners suggest in vague terms that the court should have applied the rational basis test differently—with a "more probing scrutiny" (Pet. 4) or a more "fulsome application" (*id*. at 25)—given the interests at stake. They claim that this Court has demanded a more searching application of rational basis test where, as here, the challenged legislation inhibits personal relationships, implicates the fundamental liberty interest of parents in the care and control of their children, or results in differential treatment for non-traditional families. (*Id*. at 25–26.)

Petitioners are incorrect to place Wisconsin's stepparent adoption laws in the category of laws that inhibit personal relationships or infringe on fundamental rights, and they also fail to show that a more rigorous form of rational basis review applies in cases involving non-traditional families.

First, Wisconsin's stepparent adoption laws do not inhibit or intrude on this family's "intimate personal relationships." (*Id*. at 25 (citing *Lawrence*, 539 U.S. 558).) The laws do nothing to them at all. For instance, nothing prevents Petitioners from continuing to cohabitate and raise M.M.C. together, as they have for many years. That makes this case completely unlike *Lawrence*, where this Court invalidated a law that criminalized certain types of consensual sexual conduct between two persons of the same sex. *Lawrence*, 539 U.S. at 562–64.

Second, Wisconsin's stepparent adoption laws do not infringe on the fundamental liberty interest of parents in the care and control of their children. The constitutional right to make parental decisions without interference from the government, affirmed by this Court in *Troxel v. Granville*, 530 U.S. 57 (2000), is not the same as an entitlement to *affirmative* governmental action—such as the granting of an adoption. And Petitioners have already conceded that Wisconsin's stepparent adoption laws do not infringe on fundamental rights, as they agree that rational basis review applies.

3. Lastly, Petitioners claim that "the classifications at issue discriminate against people and children in a non-traditional family structure," and argue that "[w]hen such discrimination is implicated, this Court has never hesitated to engage in probing rational basis review and to strike down legislative classifications." (Pet. 25–26.)

Petitioners do not explain what constitutes "probing rational basis review" (*id.* at 26), and how it differs from regular rational basis review. But in any event, Petitioners are wrong to suggest that this Court's precedent requires a more rigorous type of review whenever laws result in differential treatment for non-traditional families. To the contrary, the rational basis test and corresponding legislative deference "applies even when the laws at issue concern matters of great social significance and moral substance." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 300 (2022).

C. Wisconsin's stepparent adoption statutes are supported by a rational basis.

Certiorari is also not warranted because the Wisconsin Supreme Court properly applied this Court's precedent to conclude that Wisconsin's stepparent adoption statutes are constitutional. The classifications imbedded in these statutes are rationally related to the state's interests in promoting stability for adoptive children through marital families.

1. In *Obergefell*, this Court expressly recognized the benefits of marriage for children and for society at large. 576 U.S. at 668–70. The Court observed that the government has long conferred benefits on married couples to promote and nurture the institution, explaining that "[m]arriage remains a building block of our national community. For that reason, just as a couple vows to support each other, so does society pledge to support the couple, offering symbolic recognition and material benefits to protect and nourish the union." *Id*. at 669–70. As particularly relevant here, the Court included "adoption rights" as among those benefits that a state is "free" to confer based on marital status. *Id*. at 670.

Wisconsin's stepparent adoption laws confer a benefit based on marital status. The laws create a special adoption process by which a spouse may adopt the child of the other spouse without affecting any existing parental rights. Wis. Stat. §§ 48.81, 48.92(2). By giving spouses access to stepparent adoption, the government encourages marriage among unmarried

adults who may already be raising children together in the same household, in furtherance of the best interests of those children. The stepparent adoption laws thereby serve the legitimate governmental interest of promoting the institution of marriage for the best interests of children.

Petitioners argue that the stepparent adoption laws do not promote marriage but instead unlawfully "penalize" adults and children based on a decision not to marry. (Pet. 23.) This argument is unavailing. Stepparent adoption laws do not "penalize" unmarried adults and their children of any more than laws that provide other advantages based on marital status, including tax benefits, hospital access, or health insurance. Indeed, if this Court were to conclude that stepparent adoption laws are constitutionally suspect just because people in marriage-like relationships do not also have access to them, it would call into question all the many governmental benefits and privileges conferred based on marital status, contradicting this Court's express support of such laws in *Obergefell*.

2. Wisconsin also has a strong interest in ensuring that children are adopted into stable families. Wisconsin, like this Court, views marriage as a stabilizing influence on families. *Compare* Wis. Stat. § 765.001(2), *with Obergefell*, 576 U.S. at 669.

Marriage is both a legal relationship and a civil contract in Wisconsin, creating a mutual duty of support between spouses. Wis. Stat. § 765.001(2). It cannot, unlike nonmarital relationships, be terminated spontaneously or unilaterally. Given its

profound legal consequences, a marriage may only be dissolved by death or by a civil court proceeding and judgment of divorce. *See* Wis. Stat. §§ 767.315, 767.335, 767.35. Marriage also increases the likelihood that parents will remain together and generally gives children a better likelihood of a financially stable upbringing. (Pet. App. 19a.)

Wisconsin's decision to limit second parent adoption to the spouse of the child's parent is rationally related to its interest in promoting stability for adoptive children. The differential treatment for spouses as compared to other third parties—including nonmarital partners—is based on the premise that the marital family structure is more stable than other household arrangements, and that adoptive children will benefit accordingly. As observed by the Wisconsin Supreme Court, the marriage contract provides some level of assurance that the adoptive parent will remain committed to the family unit and the child's upbringing. (*Id*.)

Petitioners argue that Wisconsin's stepparent adoption statutes undermine the government's interest in stability for adoptive children because they do not also permit adoption by certain committed, nonmarital partners. (Pet. 18.) They say that "in cases like this one (where the child's parent is in a committed relationship and her partner seeks to adopt the child), the choice is not between the child being adopted by her parent's spouse or her parent's unmarried partner." (*Id*. at 19.) "[T]he question is whether the child will be adopted at all." (*Id*. (emphasis omitted).)

This argument does not work because Petitioners are making a facial challenge to the stepparent adoption statutes. (Pet. App. 6a.) A facial challenge is "a claim that the law or policy at issue is unconstitutional in all its applications." *Bucklew v. Precythe*, 587 U.S. 119, 138 (2019). Petitioners' particular circumstances—and the hypothetical existence of other cases like theirs—are thus irrelevant so long as the stepparent adoption laws do have other rational applications. A classification is not unconstitutional just because it sometimes produces harsh results or "results in some inequality." *Dandridge*, 397 U.S. at 485 (quoting *Lindsley v. Nat. Carbonic Gas Co.*, 220 U.S. 61, 78 (1911)).

The Wisconsin Supreme Court properly applied this Court's precedent to reject Petitioners' facial challenge and uphold Wisconsin's stepparent adoption statutes as constitutional.

D. Petitioners' attempt to identify indicia of irrationality in Wisconsin's adoption laws fails.

Petitioners argue that Wisconsin's adoption laws are self-contradictory in two ways and therefore irrational, in violation of the equal protection clause. (Pet. 20–24.) Petitioners' arguments fail.

1. Petitioners first claim Wisconsin's adoption laws are self-contradictory because they permit a single, unmarried adult to adopt a child without parents, but do not permit an unmarried adult to adopt the child of his or her nonmarital

partner. *Compare* Wis. Stat. § 48.82(1)(b), *with* Wis. Stat. § 48.81(4). These statutes are not in conflict.

The circumstances of a child with no parents are significantly different from those of a child with at least one parent. A child without parents is in the custody of the state and necessarily exposed to a higher incidence of instability and impermanence in her care. It makes sense that the legislature would permit single adults to adopt children without parents, notwithstanding its preference for marital households, because a stable home with a single parent is better for the child than the alternative: remaining in the foster care system or another impermanent living arrangement.

Conversely, a child with at least one parent already has permanency and is part of an existing family unit. The government thus has an added interest in restricting their adoption to only those who are most likely to add stability and provide better outcomes for the child. Wisconsin's choice to limit the adoption of a child with one parent to the spouse of the child's parent is rational in light of those interests.

2. Petitioners next argue that Wisconsin's stepparent adoption statutes conflict with "other aspects of the State's adoption regime" that eschew categorical determinations and "rest[ ] instead on individualized determinations about whether a particular adoption is in the child's best interests." (Pet. 21.) Petitioners point to the many factors that courts and agencies may consider when determining whether an adoption would be in the child's best interests and argue that "Wisconsin's categorical ban

on adoption by unmarried partners irrationally departs from that case-specific, child-focused, and nuanced approach." (*Id.* at 22.)

Here, Petitioners simply misunderstand Wisconsin's adoption statutes.

Petitioners are correct that a court must find that a proposed adoption is in the child's best interests before granting it, and that courts consider many factors when assessing a child's best interests. *See*, *e.g.*, Wis. Stat. §§ 48.88(2)(aj)2.–3., 48.91. However, in adoption proceedings, consideration of the child's best interests occurs only *after* the trial court determines that the statutory eligibility requirements are met. *See* Wis. Stat. § 48.91(3). The statutory eligibility requirements for adoption must be met before an adoption is legally permissible, irrespective of the court's subjective determination regarding the child's best interests. *See In re Topel's Estate*, 32 Wis. 2d at 229; *see also Angel Lace M.*, 184 Wis. 2d at 505. Statutory eligibility criteria—which is, by necessity, categorical—and the fact-specific best interests analysis are thus not inconsistent; they are separate parts of the adoption process serving different purposes.

Petitioners also complain that "the law here simply bans unmarried people from second-parent adoptions, regardless of the circumstances," and suggests that whether second parent adoption is permissible should be based on "the determinative issues of competence and care." (Pet. 22 (quoting *Stanley v. Illinois*, 405 U.S. 645, 656–57 (1972)).)

Wisconsin's statutory scheme for adoption is not unconstitutional just because it includes categorical eligibility criteria. Indeed, Wisconsin is unaware of *any* statutory scheme for adoption that does not include categorical eligibility criteria and instead simply authorizes courts to grant adoptions whenever the court subjectively believes that an adoption would be in the child's best interests.

* * *

The Wisconsin Supreme Court properly applied this Court's precedent to hold that Wisconsin's adoption laws satisfy the rational basis test. This Court should not use its limited time and resources to reaffirm precedent it has already issued to confirm that the Wisconsin Supreme Court reached the proper result.

III. The interests at stake are not sufficiently important to warrant this Court's review.

Petitioners have an undoubtedly strong personal stake in the outcome of this case, but that does not create grounds for this Court's review. This is particularly true where Petitioners face no legal barrier to marriage and thus continue to retain the option of marrying to avail themselves of the benefit of stepparent adoption, should they so choose.

Petitioners are free to make the deeply personal choice regarding how to structure their family. As they emphasize, they have a constitutional right to choose not to marry. (Pet. 23.) But so long as that is their choice, they will not have access to stepparent adoption—a statutory procedure available only to

spouses—just as they will not have access to all the other governmental benefits tied to marriage.

Petitioners' ability to *choose* whether to marry and avail themselves of the benefits of marriage—including stepparent adoption—makes this case fundamentally different from similar cases in which the equal protection challenger had no access at all. *See Matter of Adoption of T.K.J.*, 931 P.2d 488; *In re Adoption of R.B.F.*, 2000 PA Super 337; *In re Adoption of C.C.G.*, 762 A.2d 724; *Angel Lace M.*, 184 Wis. 2d 492. In each of those cases, the prospective adoptive parent was in a committed same-sex relationship with the child's parent, but legally prohibited from marrying them, and thus was completely barred from stepparent adoption under any circumstances. *Id*. Yet, in each case, the reviewing court found no equal protection violation. *Id*.

Here, in contrast, Petitioners face no legal barrier to marriage, and thus no corresponding barrier to stepparent adoption. This makes their equal protection claim less compelling.

IV. This Court's review is not warranted because of supposed lower-court confusion over rational basis review, and this case would a poor vehicle for clarifying rational basis review in any event.

There is likewise no need for this Court to clarify the minimum requirements of rational basis review. Even if there were, this case would be a poor vehicle for doing so.

1. First, Petitioners fail to establish widespread lower-court confusion regarding the rational basis test. This Court has articulated and applied the rational basis test many times in recent years and without questioning whether lower courts would be capable of applying it. *See*, *e.g.*, *Dobbs*, 597 U.S. 215; *United States v. Vaello Madero*, 596 U.S. 159 (2022); *Trump v. Hawaii*, 585 U.S. 667 (2018); *Armour v. City of Indianapolis*, 566 U.S. 673 (2012); *Astrue v. Capato ex rel. B.N.C.*, 566 U.S. 541 (2012).

At best, Petitioners establish only that—when considering the last two hundred years of equal protection jurisprudence—this Court's articulation of the rational basis test is not "altogether consistent." (Pet. 28–29 (quoting *Fritz*, 449 U.S. at 174, and comparing Justice Harlan's articulation of the rational basis test in *Mugler v. Kansas*, 123 U.S. 623, 661 (1887)).) To the extent that tension does exist between some of the Court's pronouncements regarding rational basis review, Petitioners do not establish that it is an acute problem requiring the Court's attention.

2. Second, even if there was confusion among lower courts as to the minimum requirements of rational basis review, this case would be a poor vehicle to resolve it. This Court's precedent makes clear that marriage is a uniquely significant institution and that states are free to confer benefits based on marital status—including in the area of adoption. *Obergefell*, 576 U.S. at 670. The rational basis supporting Wisconsin's stepparent adoption laws is thus readily apparent. Without a concrete case example providing a difficult question, this Court

would be articulating the outer bounds of rational basis review in the abstract.

Additionally, although Petitioners now argue that the minimum requirements for rational basis review are unclear, they did not raise this concern in the proceedings below. If this Court did wish to address its prior rational basis decisions, a case with litigation and discussion below regarding how the supposedly different iterations of the rational basis test may compel different results would present a far superior vehicle.

Here, a unanimous Wisconsin Supreme Court applied this Court's rational basis precedent in a straightforward manner to reach the correct result. There is no reason for this Court to review that decision, or to select this case as the framework for clarifying the rational basis test.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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