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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

All agree that it is in M.M.C.'s best interests to be adopted by petitioner T.G., as the State itself found. BIO7. Yet Wisconsin's categorical ban on second-parent adoption by unmarried people forbids that adoption. In upholding that categorical ban under the Equal Protection Clause, the Wisconsin Supreme Court applied an indefensibly lax form of rational basis review, which amounts to no review at all. This case thus presents "a question of extraordinary importance regarding personal autonomy and the protection of children in the context of the equally momentous question about whether this Court's default standard of review does or does not entail meaningful judicial scrutiny." Cato Br.1.

Respondent's main response is to downplay the importance of adoption—calling it "not a fundamental right," BIO1; perversely claiming that the challenged statute does not "inhibit personal relationships," BIO18; and doubling down on the extreme form of rational basis review applied below, BIO2. In other words, respondent's own response underscores why this Court's intervention is critical to ensure that meaningful judicial review is available for laws like the one at issue—which still exist in nearly half the country, BIO1, and create "irrationally discriminatory" classifications that "harm[] uniquely vulnerable children," Cato Br.10-11.

Respondent concedes that this case would be a good vehicle for guidance on the profoundly important question presented, but urges that the Court deny review on the ground that the decision below is "correct." BIO29. But the merits are for plenary review. And, in any event, as the petition and amici

have explained, the decision below is egregiously wrong; exacerbates confusion in lower courts over the rational basis standard; and highlights the need for this Court's intervention to protect the politically vulnerable individuals most harmed by the laws at issue—children—and ensure that rational basis review remains meaningful, especially when, as here, familial and parenting interests are implicated.

The petition should be granted.

ARGUMENT

I. THE CONSTITUTIONAL QUESTION PRESENTED IMPLICATES PROFOUNDLY IMPORTANT INTERESTS FOR CHILDREN AND FAMILIES ACROSS THE COUNTRY

Few laws implicate interests as vital and solemn as those governing adoption. Pet.11-13. Respondent acknowledges that "approximately half of the states have adoption laws like Wisconsin's" that bar "second parent adoption" by "nonmarital partners." BIO10. Those laws deny children across America a second parent, including when, as here, all agree the adoption is in the best interests of the child. Respondent's attempts to downplay the importance of the question presented are unconvincing.

According to respondent, second-parent adoption was important—but only "before *Obergefell*," when same-sex couples could not marry. BIO5. But second-parent adoption is just as important today as it ever was. It is not the sexual orientation of the couple, but the invaluable benefits of having a second parent, that matters. For children like M.M.C. whose only legal parent is in a loving, committed non-marital relationship, second-parent adoption provides additional stability, permanence, and rights.

Crucially, such adoption provides the adopted child with "the emotional security of knowing that in the event of the biological parent's death or disability, the other parent will have presumptive custody, and the children's relationship with their parents, siblings and other relatives will continue should the coparents separate." *In re Jacob*, 660 N.E.2d 397, 399 (1995); Pet.12. This interest has never been more important. In the wake of an unprecedented drug epidemic and other factors, the incidence of children in the United States becoming orphans because of the death of one or two of the child's parents has increased rapidly, especially among black children.[1]

Respondent stresses that petitioners "face no legal barrier to marriage" and can "*choose* whether to marry" and thus become eligible for second-parent adoption. BIO27. But as respondent concedes, adults "have a constitutional right to choose *not* to marry." *Id.* at 26 (emphasis added); *see* Pet. 23. Petitioners have chosen to exercise that fundamental right for deeply personal reasons that have nothing to do with their commitment to each other. The fact that States like Wisconsin discriminate against individuals—like T.G.—who exercise that right by categorically blocking them from second-parent adoption *increases* the case's significance. *Cf. Zablocki v. Redhail*, 434 U.S. 374, 387 (1978) (prohibiting States from

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[1] David A. Weaver, *Number of orphaned children in the Black community is growing rapidly: Congress must help*, The Hill (Dec. 12, 2023), https://thehill.com/opinion/finance/3945944-number-of-orphaned-children-in-the-black-community-is-growing-rapidly-congress-must-help/ ("Shockingly, almost 10 percent of Black children have one or both parents who are deceased").

"interfer[ing] directly and substantially with the right to marry").

Respondent suggests that whether children like M.M.C. can be adopted by unmarried partners like T.G. "should be resolved through the democratic process." BIO15. But that process cannot trump petitioner's constitutional guarantee to equal protection. Moreover, the greatest "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." Cato Br.11. As amici point out, "[i]t would be perverse to refer children who are harmed by Wisconsin's adoption policy to a ballot box they cannot access." *Id.* at 12.[2]

The truly exceptional importance of the question presented alone warrants this Court's review.

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[2] Respondent argues that there is "[n]o split of authority" as to the constitutionality of statutes like Wisconsin's. BIO10. But respondent neglects to mention that several appellate courts have interpreted the adoption statutes in their States or territories to allow second-parent adoption by unmarried people in a committed relationship in order to avoid the "absurd" and irrational result of defeating adoptions that are indisputably in the best interests of children. *In re Adoption of B.L.V.B.*, 628 A.2d 1271, 1273-74 (Vt. 1993); *In re Adoption of Two Children by H.N.R.*, 666 A.2d 535, 538 (N.J. Super. Ct. App. Div. 1995); *In re Adoption of K.S.P.*, 804 N.E.2d 1253, 1257 (Ind. Ct. App. 2004); *In re Adoption of L.O.F.*, 62 V.I. 655, 665-66 (2015). Moreover, as petitioners have explained, the lower courts *are* in disarray with respect to the proper test for rational basis review. Pet.26-32; *infra* 10-11. And, in any event, this Court regularly grants review where, as here, a state court "has decided an important question of federal law that has not been, but should be, settled by this Court," and where, as here, the state court decision "conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c); *see* Stephen M. Shapiro et al., *Supreme Court Practice* § 4.25 (11th ed. 2019) (collecting cases).

II. THE WISCONSIN SUPREME COURT'S DECISION IS INDEFENSIBLE

This Court's review is also warranted because the decision below is indefensible on the merits. Pet.15-26. Respondent's counter-arguments fail.

1. Respondent concedes that a more "rigorous form of rational basis review" is required where laws intrude on "'intimate personal relationships,'" but perversely asserts that this interest is not triggered by Wisconsin's adoption bar. BIO18 (citation omitted). That is absurd. T.G., A.M.B., and M.M.C. have lived together as a family for more than a decade, and the State itself has determined that allowing T.G. to cement the relationships by adopting M.M.C.—and providing her a loving, legal father—would be in her best interests. Suppl.Pet.App.56a, 64a. It is hard to think of a law that more directly intrudes on and inhibits intimate relationships than one that categorically bars adoptions like that.

Respondent likewise claims that "cases involving non-traditional famil[y] [structures]" do not require "a more rigorous form of rational basis review." BIO18. But respondent ignores this Court's cases standing for that proposition. Pet.25-26; *see U.S. Dep't of Agric. v. Moreno,* 413 U.S. 528, 538 (1973); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 447-50 (1985); *Moore v. City of E. Cleveland*, 431 U.S. 494, 499 (1977). Instead, respondent quotes (at 19) a snippet from *Dobbs v. Jackson Women's Health Organization*, saying that "matters of great social significance" are still subject to rational basis review. 597 U.S. 215, 300 (2022). *Dobbs* says nothing about the review required when a law discriminates against non-traditional family structures. Nor, of course, did

Dobbs consider laws categorically barring a class of individuals from adopting children.[3]

2. Remarkably, respondent also asserts that Wisconsin's statute does not even present a "'legislative classification amenable to federal equal protection analysis,'" because the statute "do[es] not define, classify, or target unmarried people in committed relationships at all." BIO15 (quoting Pet.16). Yet, even the Wisconsin Supreme Court recognized that the law draws a classification that requires federal equal protection analysis. Pet.App.7a-22a. For good reason. Wisconsin's adoption laws make a categorical classification based on marital status, and petitioners' central complaint is that it is irrational to categorically exclude *all unmarried individuals*, as a class, from second parent adoption. That is a classic equal protection issue. *E.g., Eisenstadt v. Baird*, 405 U.S. 438, 454-55 (1972).

3. Respondent complains that "[p]etitioners do not identify any specific error in the Wisconsin

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[3] Respondent's reliance (at 12-14) on *FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1993), is also misplaced. That case involved routine economic regulation—the regulation of cable TV franchises. *Id.* at 309. The interests affected by laws categorically barring adoption could hardly be more different. Moreover, the Court's general observations about rational basis review hardly insulate laws, like the one here, that are "irrationally discriminatory." Cato Br.10. Even under the most forgiving form of (real) rational basis review, laws can, and do, flunk. The fact that the law in *Beach Communications* survived review hardly means that fatally flawed laws like the one here survive review. And respondent's reliance (at 12) on *Beach Communications* for the proposition that the law at issue here was effectively "'unreviewable'" under rational basis—which is the very perspective that seemed to drive the Wisconsin Supreme Court's decision—only underscores the need for review.

Supreme Court's *articulation* of the rational basis test." BIO18 (emphasis added). But petitioners have identified *several* ways in which the Wisconsin Supreme Court's analysis runs roughshod over this Court's precedents. Pet.15-26. And here, the Wisconsin Supreme Court ignored this Court's directive to test the asserted state interest for a real "link between classification and objective." *Romer v. Evans*, 517 U.S. 620, 632 (1996); *see* Pet.18. By failing to minimally test the State's asserted goal for that link, the court overlooked two obvious indicia of irrationality in Wisconsin's adoption classifications—that they (1) undermine the State's asserted interests, and (2) are self-contradictory. Pet.18-22.

4. When respondent is finally forced to confront those indicia of irrationality, respondent's arguments—just like the Wisconsin Supreme Court's own rational basis review—crumble.

First, respondent has no real response to petitioners' argument that Wisconsin's legislative classifications are irrational because they actually *undermine* the State's own asserted interest of providing children with stable adoptive homes. Pet.18-19. Instead, respondent (at 22) repeats the Wisconsin Supreme Court's mistake of comparing children adopted by a stable married person to children adopted by someone else, completely ignoring that the relevant comparison here—and in every case involving an unmarried partner—is between being adopted by a married person or *not at all* and thus being deprived of the stability that comes from a second legal parent. *See* Pet.19.

Respondent argues that "the marriage contract provides *some level* of assurance that the adopter will remain committed to the child's family unit and

upbringing." BIO8 (emphasis omitted). Of course, many married individuals are bad parents, and many unmarried individuals are great parents. Here, the State itself found that it would be in M.M.C.'s best interests for T.G. to adopt her. The facts of this case (and others like it) thus illustrate how Wisconsin's categorical exclusion of unmarried partners irrationally excludes an entire class of potentially fit and loving parents, at the expense of the children whose interests the law purportedly serves.[4]

Second, respondent also largely ignores that Wisconsin's statutory scheme is self-contradictory—and thus irrational—in multiple respects. Pet.21-22. Indeed, Wisconsin treats unmarried people more harshly than convicted felons or those suffering from serious psychological illness. The former are categorically disqualified from second-parent adoption, while the latter are filtered through individualized, best-interests determinations. *Id.* This discrepancy lacks any conceivably rational explanation. Respondent (at 25) dismisses petitioners' argument as an attack on *all* "categorical" eligibility criteria. Not so. Petitioners' point is simply that categorical eligibility criteria cannot survive rational basis review when they irrationally contradict the statutory scheme, as they do here.

Respondent also fails to seriously grapple with the irrationality of Wisconsin's contradictory approach to

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[4] Respondent tries to dismiss the facts of this case by claiming (at 23) that petitioners "are making a facial challenge." That misapprehends the argument. The facts of this case (and others like it) simply illustrate how a *categorical* ban on second-parent adoption by unmarried adults is an irrational tool for securing the asserted state interest in stability. Pet.19.

adoption by unmarried people—i.e., permitting such adoption in general while categorically banning it in the context of second-parent adoption. Pet.20-21. Respondent says that it "makes sense" to permit unmarried people "to adopt children without parents" "because a stable home with a single parent is better for the child than the alternative." BIO24. But the same is obviously true for second-parent adoption: It is plainly better for a child to have a stable home—with two legal parents—than having only one legal parent. *See supra* 2-3. Even aside from the emotional benefits of having two parents, a child with one parent risks being placed into foster care if the parent dies, or could lose critical benefits. Pet.11-13. Wisconsin's statutory scheme thus violates the "principle of non-contradiction." *Merrifield v. Lockyer*, 547 F.3d 978, 991 (9th Cir. 2008).

5. Respondent alternatively tries to justify Wisconsin's classification in the most general terms as the conferral of a "benefit[] on married couples to promote and nurture the institution." BIO20. But respondent ignores that Wisconsin's adoption statute is conflicted on marriage, as it permits unmarried people to adopt in most circumstances. Wis. Stat. § 48.82(1)(b). Respondent also ignores the uniquely extreme *penalty* that Wisconsin's law imposes on both adults and innocent children by preventing unmarried people from cementing their relationships with their partners' children. Pet.22-23. That readily distinguishes the law at issue in this case from others

that grant incremental benefits to adult individuals themselves based on marital status.[5]

Of course a State may consider marital status as part of the best-interests determination. But it is irrational to *categorically* bar all unmarried adults—no matter *how* fit and loving—from second-parent adoption. Respondent's attempts to defend that irrational ban only underscore the need for review.

III. THIS CASE PRESENTS AN IDEAL VEHICLE TO RESOLVE THE CONFUSION OVER RATIONAL BASIS REVIEW

This case also presents a clean vehicle—and thus an ideal opportunity—to provide much-needed guidance to lower courts on the minimum requirements for rational basis review.

There is considerable tension in this Court's cases and pronouncements on rational basis review. Pet.28-32; Cato Br.4-7. This tension has led to confusion and frustration among lower courts and scholars alike. Pet.29-30; Cato Br.4-5 & nn.6-9. It has also led many lower courts—including the court below—to adopt and apply a form of rational basis review that is so lax that it "tends to be no review at all." *King v. State*, 818 N.W.2d 1, 86 (Iowa 2012) (Appel, J., dissenting). This intolerable situation cries out for this Court's guidance and correction.

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[5] Respondent relies (at 20) on a passing reference in *Obergefell v. Hodges*, noting that States have historically linked many "rights"—including "adoption rights"—to marriage. 576 U.S. 644, 670 (2015). But *Obergefell* obviously did not address the law at issue. And *Obergefell*'s general observation about state historical practice cannot be read as endorsing *all* classifications based on marriage, much less all adoption classifications based on marriage, regardless of the particulars.

Respondent concedes that "this Court's articulation of the rational basis test is not 'altogether consistent.'" BIO28. But respondent suggests that the degree of inconsistency is minor and presents no "acute problem" needing clarification. *Id.* That blinks reality. Lower courts are all over the map in their understanding and applications of rational basis review. Pet.30. And as amici note, "[w]hich version" of the rational basis test "a court chooses to apply generally determines the outcome of the case." Cato Br.4-5 & n.9. Unsurprisingly, jurists and scholars have expressed continued frustration and confusion with the doctrinal morass. *See, e.g.*, *King*, 818 N.W.2d at 85-86 (Appel, J., dissenting) (noting unresolved "inconsistency" and listing scholars acknowledging that "[this] Court has clearly applied a number of materially different rational basis tests").

Meantime, numerous courts—including the Wisconsin Supreme Court below—have adopted a form of rational basis review that is a "virtual rubber-stamp" of legislative action. Such review is no review at all and is thus a pernicious form of judicial "abdicat[ion]." *Hettinga v. United* States, 677 F.3d 471, 481 (D.C. Cir. 2012) (Brown, J., concurring), *cert. denied*, 568 U.S. 1088 (2013). The Court's intervention is needed to correct this trend.

Respondent does not seriously contest that this case presents a clean vehicle for this Court to provide needed guidance on the minimal requirements for rational basis review. Pet.32-33. Instead, respondent simply repackages merits arguments as a vehicle argument, positing that "this case would be a poor vehicle" to "resolve" the "confusion" about the minimum requirements of rational basis review because "[t]he rational basis supporting Wisconsin's

stepparent adoption laws is … readily apparent." BIO28. That is not a vehicle argument. And as explained, the defining feature of the law at issue is irrationality—which is all the more reason to grant review.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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