No. 14-___

In the

Supreme Court of the United States

SCOTT WALKER, *et al.*,

Petitioners,

v.

VIRGINIA WOLF, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Fourteenth Amendment prohibit a state from defining and recognizing marriage as only the legal union between one man and one woman?

LIST OF PARTIES

Petitioners are Scott Walker, in his official capacity as Governor of Wisconsin, J.B. Van Hollen, in his official capacity as Attorney General of Wisconsin, and Oskar Anderson, in his official capacity as State Registrar of Vital Statistics of Wisconsin.

Respondents are Virginia Wolf, Carol Schumacher, Kami Young, Karina Willes, Roy Badger, Garth Wangemann, Charvonne Kemp, Marie Carlson, Judith Trampf, Katharina Heyning, Salud Garcia, Pamela Kleiss, William Hurtubise, Leslie Palmer, Johannes Wallmann, and Keith Borden.

The only parties to the proceeding not listed in the caption are defendant Jospeh Czarnezki, in his official capacity as Milwaukee County Clerk, Wendy Christensen, in her official capacity as Racine County Clerk, and Scott McDonell, in his official capacity as Dane County Clerk, all of whom did not appeal the district court ruling.

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Scott Walker, in his official capacity as Governor of Wisconsin, J.B. Van Hollen, in his official capacity as Attorney General of Wisconsin, and Oskar Anderson, in his official capacity as State Registrar of Vital Statistics of Wisconsin, respectfully petition the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

The petitioners waive their right to file a reply in support of this petition so that the Court can consider the petition at its September 29, 2014, conference.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit is reported at ---F.3d ----, 2014 WL 4359059, and is reprinted at Appendix A, 1a-44a.

The judgment of the United States Court of Appeals for the Seventh Circuit is reprinted at Appendix B, 45a-46a.

The opinion and order of the United States District Court for the Western District of Wisconsin granting plaintiffs' motion for summary judgment and declaring unconstitutional article XIII, § 13 of the Wisconsin Constitution is reported at 986 F. Supp. 2d 982 and is reprinted at Appendix C, 47a-143a.

The opinion and order of the United States District Court for the Western District of Wisconsin granting a permanent injunction is unreported, available at 2014 WL 2693963, and is reprinted at Appendix D, 144a-160a.

The judgment of the United States District Court for the Western District of Wisconsin is reprinted at Appendix E, 161a-164a.

JURISDICTION

The court of appeals entered its judgment on September 4, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the U.S. Constitution states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its

> jurisdiction the equal protection of the laws.

Wisconsin Const. art. XIII, § 13 states:

> Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state.

Wisconsin Stat. § 765.001(2) states, in relevant part:

> It is the intent . . . to promote the stability and best interests of marriage and the family. . . . Marriage is the institution that is the foundation of the family and of society. Its stability is basic to morality and civilization, and of vital interest to society and the state. The consequences of the marriage contract are more significant to society than those of other contracts, and the public interest must be taken into account always. . . . The impairment or dissolution of the marriage relation generally results in injury to the public wholly apart from the effect upon the parties immediately concerned. Under the laws of this state, marriage is a legal relationship between 2 equal persons, a husband and wife, who owe to each other mutual responsibility and support. Each spouse has an equal

> obligation in accordance with his or her ability to contribute money or services or both which are necessary for the adequate support and maintenance of his or her minor children and of the other spouse.

Wisconsin Stat. § 765.01 states, in relevant part:

> Marriage, so far as its validity at law is concerned, is a civil contract, to which the consent of the parties capable in law of contracting is essential, and which creates the legal status of husband and wife.

Wisconsin Stat. § 765.16(1m) states, in relevant part:

> Marriage may be validly solemnized and contracted in this state only . . . by the mutual declarations of the 2 parties to be joined in marriage that they take each other as husband and wife[.]

STATEMENT OF THE CASE

Since statehood, Wisconsin has defined marriage in traditional terms as the union of one man and one woman. Eight years ago, when confronted with the real possibility that state court judges might find traditional marriage laws unconstitutional under the state constitution (as had occured in other states such as Hawaii, Vermont, and Massachusettes), Wisconsonites voted overwhelmingly in favor of a

referendum amending the Wisconsin Constitution to provide that only a marriage between a man and a woman shall be recognized in Wisconsin, and that a legal status identical or substantially similar to marriage for unmarried individuals shall not be recognized. The marriage amendment referendum, voted for by 1,264,310 Wisconsin residents—over 59% of voters—was an act of a functioning democracy. This reaction to the threat of judicial activism was not unique to Wisconsin: voters in 29 other states similarly amended their constitutions to remove the definitional issue of marriage from the field of judge-made law, and memorialized the traditional definition of marriage into constitutional law.

This democratically initiated strategy of protecting traditional marriage had one fatal flaw: starting in 2010, *federal* courts started to invalidate state-law definitions based on the *federal* constitution.

Just last week, the Seventh Circuit struck down Wisconsin's constitutional amendment and re-defined marriage for the State of Wisconsin. The Seventh Circuit, in finding that Wisconsin's traditional marriage laws violate the Equal Protection Clause of the Fourteenth Amendment, ignored Wisconsin voters' right to "exercise[] their privilege to enact laws as a basic exercise of their democratic power." *Schuette* v. *Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1637 (2014) (plurality). Like *Schuette*, "[t]his case is not about how the debate . . . should be resolved. It is about who may resolve it." *Id.* at 1638. Instead of

deferring to the wisdom of *Schuette*, the Seventh Circuit voided the policy preference of more than a million Wisconsin voters and inserted the policy preference of three judges.

The merits are not unique to this case. At least three other petitions for writs of certiorari relating to same-sex marriage are pending. *See Herbert, et al. v. Kitchen, et al.*, No. 14-124; *Smith v. Bishop, et al.*, No. 14-136; *Rainey v. Bostic, et al.*, Nos. 14-153, 14-225, 14-251. Others will soon follow.

This case, however, is the ideal vehicle to fully and finally resolve *all* issues regarding this compelling nationwide "debate between two competing views of marriage." *United States v. Windsor*, 133 S. Ct. 2675, 2718 (2013) (Alito, J., dissenting). This case uniquely presents:

- Both marriage licensing and recognition issues;
- Both a state constitutional amendment and a statutory scheme that recognizes only opposite sex marriage;
- The effect, if any, of domestic partnership laws on the propriety of traditional marriage laws;
- Viable defendants who are actively defending the laws; and
- No standing problems for plaintiffs.

The State of Wisconsin, along with at least 30 other states,[1] filed *amici curiae* briefs supporting Herbert's and Reyes' petition for a writ of certiorari. *See Herbert*, No. 14-124. A broad nationwide consensus agrees that the Court's review is necessary. So the question is not *whether* this Court should address the issue, but rather *what state* presents the apprporiate vehicle for the Court's resolution. The purpose of this Petition is to argue that Wisconsin uniquely presents the optimal vehicle for reviewing this compelling issue of nationwide importance.

REASONS FOR GRANTING THE PETITION

I. THE QUESTION PRESENTED IS OF OBVIOUS EXCEPTIONAL CONSTITUTIONAL AND SOCIETAL IMPORTANCE.

The constitutionality of states' traditional marriage laws as presented in this, and other states' cases, *i.e.*, *Herbert*, No. 14-124, *Bishop*, No. 14-136, *Rainey*, Nos. 14-153, 14-225, 14-251, is of obvious exceptional constitutional and societal importance,

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[1]On September 4, 2014, Wisconsin, along with Colorado, Alabama, Alasaka, Georgia, Idaho, Louisiana, Montana, Mississippi, Missouri, Nebraska, North Dakota, Oklahoma, South Carolina, South Dakota, and West Virginia filed an *amici curiae* brief in support of Herbert's petition for writ of certiorari. Massachusetts, California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, New Mexico, New York, Oregon, Pennsylvania, Vermont, and Washington filed a separate *amici curiae* brief in support of Herbert and Reyes' petition for writ of certiorari.

both to the petitioners and the respondents in this case and for citizens and sovereigns nationwide. This is beyond dispute: persons on all sides of the issue have found common ground in requesting that the Court grant certiorari to determine the constitutionality of state-based traditional marriage laws.

According to Colorado and other states' *amici curae* brief supporting Petitioners Herbert's and Reyes' petition, *see Herbert*, No. 14-124, 89 same-sex marriage cases are presently pending in 31 states nationwide, including several cases before the Fifth,[2] Sixth,[3] and Ninth[4] Circuits. The

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[2]Briefing is ongoing in *De Leon v. Perry*, 975 F. Supp. 2d 632 (W.D. Tex. 2014), appeal docketed, No. 14-50196.

[3]Oral argument was heard on August 6, 2014, in six cases from four States (cases within the same State were consolidated): *DeBoer v. Snyder*, 973 F. Supp. 2d 757 (E.D. Mich. 2014), appeal docketed, No. 14-1341; *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968 (S.D. Ohio 2013), appeal docketed, *Obergefell v. Himes*, No. 14-3057; *Henry v. Himes*, No. 14-CV-129, 2014 WL 1418395 (S.D. Ohio Apr. 14, 2014), appeal docketed, No. 14-3464; *Bourke v. Beshear*, 996 F. Supp. 2d 542 (W.D. Ky. 2014), appeal docketed, No. 14-5291; *Love v. Beshear*, 989 F. Supp. 2d 536 (W.D. Ky. 2014), appeal docketed, No. 14-5818; *Tanco v. Haslam*, No. 13-CV-1159, 2014 WL 997525 (M.D. Tenn. Mar. 14, 2014), appeal docketed, No. 14-5297.

[4]Oral argument was heard on September 8, 2014, in three cases: *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065 (D. Haw. 2012), appeal docketed, Nos. 12-16995, 12-16998; *Sevcik v. Sandoval*, 911 F. Supp. 2d 996 (D. Nev. 2012), appeal docketed, No. 12-17688; *Latta v. Otter*, No. 13-CV-482, 2014 WL 1909999 (D. Idaho May 13, 2014), appeal docketed, Nos. 14-35420, 14-35421.

constitutional issues presented in this petition are of particular importance, not just to Petitioners and Respondents, but to people supporing traditional marriage laws, as well as same-sex marriage rights, across the country.

II. THIS CASE IS THE IDEAL VEHICLE FOR FULLY RESOLVING THE CONSTITUTIONAL QUESTIONS RELATING TO SAME-SEX MARRIAGE.

This case is the ideal vehicle for resolving *all* constitutional questions relating to same-sex marriage.

First, this case involves three distinct categories of claims and claimants: Wisconsin resident couples who married in Minnesota and seek recognition of their out-of-state marriages under Wisconsin law; former California residents whose marriage was recognized by California law who seek recognition of their marriage under Wisconsin law; and unmarried couples who seek Wisconsin marriage licenses. *See* App. C, 52a-53a. Unlike other states where some but not all issues are presented, *i.e.*, *Bishop*, No. 14-136, this case would allow the Court to fully address issues relating to both the issuance of marriage licenses, as well as recognition of out-of-state marriages conducted under varying circumstances.

Second, the defendants, Wisconsin Governor Scott Walker, Attorney General J.B. Van Hollen, and

State Registrar of Vital Statistics Oskar Anderson, have all consistently defended Wisconsin's traditional marriage laws. Several county clerks remain defendants, at least one of whom, *i.e.*, Racine County Clerk Wendy Christensen, has defended Wisconsin's marriage laws. Unlike other states where officials have not defended the laws, *i.e.*, *Rainey*, Nos. 14-153, 14-225, 14-251, or have limited enforcement authority, *i.e.*, *Herbert*, No. 14-124, this case presents Wisconsin's chief executive, its top law enforcement official, and its agent responsible for establishing and recording marriage licenses as defendants actively defending the laws.

Third, Wisconsin's marriage laws are codified both in a state constitutional amendment and as part of a comprehensive statutory scheme. The constitutional amendment was adopted by two successive legislatures and overwhelmingly ratified by the people in a statewide referendum, 59% to 41%. The statutory scheme, literally dating to statehood, has consistently defined marriage in traditional terms as between one man and one woman. *See* Wis. Stat. ch. 78 (1849); Wis. Stat. ch. 245 (1959); Wis. Stat. ch. 765 (1979). Unlike other states that have only state statutes and not constitutional amendments, *i.e.*, *Baskin v. Bogan*, No. 14-2386 (7th Cir.), Wisconsin presents both a constitutional amendment and a comprehensive statutory scheme.

Fourth, although Wisconsin has consistently affirmed its traditional marriage laws, it has also recognized domestic partnerships for same-sex couples, providing a package of rights and benefits

similar to those provided by civil marriage. *See* Wis. Stat. ch. 770; *see also Appling v. Walker*, 2014 WI 96, ¶ 57, 2014 WL 3744232 (affirming the constitutionality of Wisconsin's domestic partnership laws). No other petitioning state has domestic partnership or civil union laws providing legal recognition for same-sex couples. This is particularly significant here, where Wisconsin has argued before lower courts that, under the substantive due process doctrine, any fundamental right to marriage does not extend to include all tangible and intangible benefits incident to marriage. Domestic partnership laws' effects, if any, on whether a state's traditional marriage laws pass constitutional muster, or were motivated by animus, can only be presented in this case.

Fifth, unlike *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), neither standing nor jurisdictional issues will prevent the Court from from considering the question presented. Here, Wisconsin's Governor, Attorney General, and State Registrar of Vital Statistics are all appropriate parties to defend, enforce, and implement Wisconsin's laws. Respondents are appropriate parties to challenge the laws. The parties present a concrete adversarial conflict between Petitioners and Respondents.

Sixth, both Petitioners and Respondents have found common ground in recognizing the importance of the issues presented and the need for swift resolution by the Court. Following the district court's decision, *see* App. C, hundreds of same-sex

couples applied for and received marriage licenses in Wisconsin. At present, the legal status of their marriages is unknown. The parties are thus faced with a quandary: either the respondent same-sex couples' constitutional rights are being denied or Wisconsonites' voices, as reflected by their votes in a statewide referendum, will be silenced. Either way, the Court should grant Wisconsin's petition and conclusively settle this ongoing, emotionally charged debate between these two competing views of marriage.

III. WISCONSIN WOULD PRESENT A UNIQUE LEGAL PERSPECTIVE REGARDING THE POSITIVE/NEGATIVE RIGHTS DICHOTOMY UNDER THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE.

Unlike any other state involved in a traditional marriage laws challenge, Wisconsin has presented a theory based upon the idea that the Fourteenth Amendment's Due Process Clause is not a charter of positive rights for citizens. Instead, the Fourteenth Amendment—through the Due Process Clause—prevents government intrusion into citizens' lives and confers no positive, tangible benefits on citizens or corresponding obligations upon government. Plaintiffs in all nationwide same-sex marriage cases have requested courts to require state governments to provide a marital licensing scheme that recognizes and provides certain rights and confers certain

benefits upon same-sex couples. Wisconsin's position is that the substantive due process doctrine does not affirmatively confer such rights and benefits.

The Court has emphasized the distinction between negative and positive rights under the Fourteenth Amendment's Due Process Clause. *See DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 195-96 (1989) (Due Process Clause "prevent[s] government from abusing [its] power, or employing it as an instrument of oppression," but "confer[s] no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual") (internal quotations omitted). The Framers were content to leave the area of affirmative governmental obligations "to the democratic political processes." *Id.*

Wisconsin's unique argument is that, particularly in the area of marriage rights, the Fourteenth Amendment's Due Process Clause is an inappropriate mechanism to foist upon the States the affirmative obligation to provide a benefit to a particular class of people. States could, if they chose, get out of the business of marriage altogether and leave it to solely secular recognition without offending the Fourteenth Amendment. *See Windsor*, 133 S. Ct. at 2691 ("regulation of domestic relations is an area that has long been regarded as a virtually exclusive province of the States") (citation and internal quotation marks omitted). Accordingly,

Wisconsin would bring this unique prospective to the Court's consideration of the issue of the constitutionality of same-sex marriage.

Although the Seventh Circuit did not grant relief on Due Process Clause grounds, plaintiffs in this and nearly all other same-sex marriage cases have consistently requested such relief on that basis and are expected to do so before this Court.

IV. THE SEVENTH CIRCUIT'S INIMITABLE, BUT WRONG, EQUAL PROTECTION ANALYSIS WARRANTS THIS COURT'S DIRECT REVIEW.

The Court should also grant review because the Seventh Circuit's decision is rife with judicial policymaking and the creation of new judge-made law, instead of the even, measured, and modest applicaiton of this Court's existing precedent.

A. The Seventh Circuit's analysis eschews this Court's tiered equal protection jurisprudence in favor of an inherently subjective cost-benefits analysis.

The Seventh Circuit's analysis eschews this Court's tiered equal-protection jurisprudence in favor of an inherently subjective cost-benefit analysis. Ultimately, the Seventh Circuit's analysis

reflects a policy judgment rather than a constitutional one.

The Seventh Circuit's decision begins by paying lip service to a statement from this Court's decision in *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993), that "equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." App. A, 3a. Rapidly shifting gears, the Seventh Circuit then fashions a policy-based four-part test that does not harmonize with this Court's Equal Proectition jurisprudence. The Seventh Circuit's test is:

> 1. Does the challenged practice involve discrimination, rooted in a history of prejudice, against some identifiable group of persons, resulting in unequal treatment harmful to them?
>
> 2. Is the unequal treatment based on some immutable or at least tenacious characteristic of the people discriminated against (biological, such as skin color, or a deep psychological commitment, as religious belief often is, both types being distinct from characteristics that are easy for a person to change, such as the length of his or her fingernails)? . . .
>
> 3. Does the discrimination, even if based on an immutable characteristic, nevertheless confer an important

> offsetting benefit on society as a whole? . . .
>
> 4. Though it does confer an offsetting benefit, is the discriminatory policy overinclusive because the benefit it confers on society could be achieved in a way less harmful to the discriminated-against group, or underinclusive because the government's purported rationale for the policy implies that it should equally apply to other groups as well?

App. A, 5a-7a.

These four questions—although they are not accompanied by a single citation to a case—"go to the heart of equal protection doctrine." App. A, 7a. Questions 1 and 2 "are consistent with the various formulas for what entitles a discriminated-against group to heightened scrutiny of the discrimination," and questions 3 and 4 "capture the essence of the Supreme Court's approach in heightened-scrutiny cases." *Id.*

The primary problem with questions 1 and 2 is that they presume that a state is engaged in baseless discrimination when it favors traditional marriage. This is a faulty assumption that puts cart firmly before horse. Nowhere in this Court's equal-protection jurisprudence is unlawful discrimination presumed first.

The primary problem with questions 3 and 4 is that they do not fairly determine whether a state's law is sufficiently "tailored" to meet a state's proffered interests. *See* App. A, 7a. Instead, questions 3 and 4 demand that a state show that the law creates a benefit that does not outweigh the costs of a different, less strict law, which might be hypothetically less burdensome on a particular group of people. Questions 3 and 4 are merely judicial stand-ins for a state legislature's policymaking and would be wholly inappropriate in a rational-basis analysis. *See Heller v. Doe*, 509 U.S. 312, 320 (1993) (a classification "must be upheld . . . if there is any reasonably conceivable state of facts" that could justify it) (citation and internal quotatation marks omitted). In other words, if the answers to questions 1 and 2 are "no," questions 3 and 4 are utterly inconsistent with this Court's rational-basis jurisprudence.

The Seventh Circuit's decision does not state whether some or all of its four questions must be answered in the affirmative or the negative. It does not state whether an answer of "no" to the first two questions means that a court need not proceed to the last two. It does not state whether any of the four questions are dispositive of the entire constitutional issue. The questions only create *more* questions for a future district or circuit court that might be called upon to apply the new analysis. The analysis itself is policy-driven and eschews this Court's tiered Fourteenth Amendment Equal Protection case law to such an extent that it cannot stand.

B. The Seventh Circuit's analysis is an indecipherable amalgam of numerous Fourteenth Amendment theories, which will result in confusion for lower courts.

The Seventh Circuit's decision unnecessarily confuses Fourteenth Amendment Equal Protection jurisprudence. The decision is untethered to any particular constitutional test and is an indecipherable amalgam of several—at times contradictory—theories, none of which provides a satisfactory basis to strike down Wisconsin's traditional marriage laws.

A consequence of the Seventh Circuit's approach here is that it will confuse Fourteenth Amendment Equal Protection jurisprudence in the Circuit and beyond, particularly with regard to when and how the rational basis standard is to be applied. This is not the first time in recent memory that the Seventh Circuit has side-stepped this Court's precedents in favor of its own unique concept of the Fourteenth Amendment. *See, e.g.*, *Planned Parenthood of Wis. v. Van Hollen*, 738 F.3d 786, 798 (7th Cir. 2013) (Posner, J.), *cert. denied*, 134 S. Ct. 2841 (June 23, 2014) (affirming an injunction against Wisconsin's admitting-privileges requirement for abortion doctors while applying this Court's "undue burden" analysis as a cost-benefits anlaysis: "The feebler the medical grounds, the likelier the burden, even if slight, to be 'undue' in the sense of disproportionate

or gratuitous."). This Court should take the instant case to prevent further unwarranted confusion in the Seventh Circuit's Fourteenth Amendment jurisprudence and to clarify the proper test.

The Seventh Circuit indicates that its decision finds guidance in a statement from *Beach Commc'ns*: "In areas of social and economic policy, a statutory classification that neither proceeds *along suspect lines* nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." App. A, 3a (quoting *Beach Commc'ns*, 508 U.S. at 313; Seventh Circuit's emphasis). The Seventh Circuit calls the "along suspect lines" language "the exception applicable to this pair of cases" and the "formula" that it is applying. App. A, 3a.

The "formula" then vanishes from sight. Throughout its decision, the Seventh Circuit shifts gratuitously between numerous Equal Protection theories, never explaining which of the several contradicting legal standards it is ultimately applying or how the Seventh Circuit's "simplified four-step analysis," App. A, 42a, is consistent with *Beach Commc'ns*' "formula." The Seventh Circuit conceives of the Fourteenth Amendment inquiry as some or all of the following, depending

upon which policy justifications it chose to emphasize at a particular juncture in its decision:

- Holding that "more than a reasonable basis is required" when the classification is "along suspect lines;" App. A, 4a;

- Determining that government discrimination "against a minority, when based on an immutable characteristic of the members of that minority (most familiarly skin color and gender), and occurring against an historical background of discrimination against the persons who have that characteristic," creates a "presumption" of an equal protection violation that is "rebuttable, if at all, only by a compelling showing that the benefits of the discrimination to society as a whole clearly outweigh the harms to its victims;" App. A, 4a-5a;

- Holding that, in a "heightened scrutiny" case, the classification must serve "'important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives;'" App. A, 7a (quoting *United States v. Virginia*, 518 U.S. 515, 524 (1996));

- Evaluating whether a law is over- or unerinclusive as a means of determining "arbitrariness;" App. A, 8a;

- Determining that the classification here is "irrational" and "therefore unconstitutional even if the discrimination is not subjected to heightened scrutiny;" App. A, 9a;

- Finding that "*groundless* rejection of same-sex marriage by government must be a denial of equal protection of the laws;" App. A, 15a (emphasis in original);

- Holding that the law "'must bear a rational relationship to a legitimate governmental purpose;'" App. A, 28a (quoting *Romer v. Evans*, 517 U.S. 620, 635 (1996)); and

- Indicating that the state must come forth with "*some* evidence," to support its rational basis argument that same-sex marriage could transform traditional marriage negatively; App. A, 34a (emphasis in orginal).

Cataloguing all of the varied and contradictory "tests" in the Seventh Circuit's decision is unnecessary. The point is that it is not possible to ascertain *any* governing standard from the Seventh Circuit's decision. At most, the Seventh Circuit applied a form of heightened scrutiny. At least, the Seventh Circuit applied rational basis scrutiny and concluded that Wisconsin's traditional marriage laws are irrational. The result is clear, but the methodology is not. That's the problem.

The lack of a clear statement of the constitutional standard illustrates the policy-driven nature of the Seventh Circuit's decision and the confusion it will create in Fourteenth Amendment Equal Protection jurisprudence in the Seventh Circuit and beyond.

This Court should take this case to clarify what standard applies, whether it is heightened scrutiny or rational basis. The Court should then apply that standard to conclude that Wisconsin's traditional marriage laws do not violate the Equal Protection Clause.

V. WISCONSIN'S AND INDIANA'S APPEAL PRESENTS THE MOST DIRECT PATH TO A SATISFACTORY RESOLUTION OF THIS IMPORTANT ISSUE.

Contemporaneous with the filing of this petition, Indiana is filing a petition for a writ of certiorari to seek review of the same Seventh Circuit decision. This Court should grant both petitions and consider the cases together because they present the most uncomplicated procedural postures. These cases also squarely present the most salient legal issue, equal protection, by advancing a positive-rights limiting principle that will restrain the lower courts' interest in granting new social rights under the due-process provision.

CONCLUSION

This Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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