

No. _____

IN THE
Supreme Court of the United States

PENNY BOGAN, IN HER OFFICIAL CAPACITY AS BOONE
COUNTY CLERK, ET AL.,

Petitioners,

v.

MARILYN RAE BASKIN, ET AL.,

Respondents.

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

**RESPONSE TO PETITION
FOR WRIT OF CERTIORARI**

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QUESTION PRESENTED

Whether a statute violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the U.S. Constitution by prohibiting same-sex couples from marrying and by refusing to recognize their lawful, out-of-state marriages.

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INTRODUCTION

Respondents in all three of these consolidated cases, *Baskin v. Bogan*, *Fujii v. Commissioner of the Indiana State Department of Revenue*, and *Lee v. Abbott*, file this brief in response to the petition for certiorari filed by Petitioners, Indiana state officials and a county clerk. As discussed *infra*, the Seventh Circuit correctly held that it is unconstitutional under the Equal Protection Clause for the State of Indiana to refuse to marry same-sex couples or to recognize marriages of such couples from other states. That ruling is consistent with the more than two dozen other rulings of federal courts, including the Fourth and Tenth Circuits, that have been issued since this Court's decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013). Unlike the Fourth and Tenth Circuits, the Seventh Circuit found an equal protection violation created by a statute that excludes same-sex couples from marriage and prohibits the recognition of otherwise legal out-of-state marriages.

Despite the correctness of the ruling below, Respondents agree that the Court should grant review in this case because the issue is of fundamental importance to Respondents and the country as a whole, because this Court and other courts have granted stays of similar lower court judgments pending review by this Court, and because final relief for Respondents is not likely to come until this Court decides these constitutional issues. This case is an excellent vehicle for resolving the constitutional questions raised here. The State

has vigorously defended the law throughout the litigation, the Court of Appeals addressed the full range of potential justifications advanced by parties defending the marriage laws, and the uniqueness of the equal protection holding among the petitions pending before this Court make it appropriate to grant certiorari in this case, potentially in conjunction with one or more other cases.

STATEMENT

A. Respondents

Respondents are six same-sex couples who wish to marry in Indiana but cannot; eight same-sex couples and one widow married outside of Indiana, whose marriages Indiana does not recognize; and eight children raised by these couples, who seek full and equal recognition for the families to which they belong. The respondent couples wish to marry, or to have their lawful marriages from other jurisdictions recognized in their home state of Indiana, for the same reasons that opposite sex couples marry. These reasons include the dignity, respect, love, and commitment that the institution of marriage uniquely bestows in our society. On a more practical level, they include the guarantee that a surviving spouse would be recognized as such on a death certificate in *Baskin*, the ability to pass joint property to a surviving spouse without the imposition of the state gift tax penalty in *Fujii*, and the ability to secure death benefits for spouses of first responders who are killed in the line of duty in

Lee. The Indiana marriage ban deprives the Respondent children of tangible benefits, and demeans their respective families by imposing a stigma upon them. Being able to marry not only would provide these families with financial and healthcare security but also would demonstrate to their children the legitimacy and strength of their family union. Moreover, the ability to marry, and the recognition of out-of-state marriages, would not only allow Respondents to obtain the numerous benefits extended by both the United States and Indiana to married couples, but would allow them to obtain the profound emotional and psychological benefits that marriage bestows. The pressing nature of the deprivations caused by Indiana’s marriage ban is evidenced by respondents Nikole Quasney and Amy Sandler, who seek recognition of their out-of-state marriage for their family while Ms. Quasney battles the final stages of Stage IV ovarian cancer.¹

Respondents brought this suit against Petitioners, who are State officials and a county clerk (collectively, the “State”) who execute and enforce Indiana’s laws limiting marriage to the union of a man and a woman. These couples are denied the status of marriage because of the State’s enforcement of the marriage ban.

¹ The marriage of Ms. Quasney and Ms. Sandler has been recognized in Indiana since April 18, 2014, when the District Court issued a temporary restraining order in their favor. App. 126a. The Seventh Circuit subsequently lifted its stay of the District Court’s order, as applied to this couple only, on July 1, 2014. App. 57a.

B. Indiana’s Marriage Ban

The Indiana Code bans same-sex couples from marrying and does not recognize their valid out-of-state marriages. Under Indiana law,

- (a) Only a female may marry a male. Only a male may marry a female.
- (b) A marriage between persons of the same gender is void in Indiana even if the marriage is lawful in the place where it is solemnized.

Ind. Code § 31-11-1-1.

The petition in this case arises from a facial and as applied federal constitutional challenge to Indiana Code § 31-11-1-1, along with any other Indiana law preventing the celebration or recognition of marriage by same sex couples (“the marriage ban”).

C. Procedural History

1. The District Court Decision

This case was brought by Plaintiffs-Respondents in three separate actions that were consolidated on appeal before the Seventh Circuit: *Baskin v. Bogan* (No. 14-2386); *Fujii v. Commissioner of the Indiana State Department of Revenue* (No. 14-2387); and *Lee v. Abbott* (No. 14-2388). All three complaints challenged Indiana’s marriage ban as a violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the U.S. Constitution.

On June 25, 2014, the District Court granted summary judgment for Plaintiffs-Respondents in each of the three cases. Petitioners' Appendix ("App.") 66a-108a.²

The District Court based its decision on both due process and equal protection grounds. It concluded that the fundamental right to marriage encompasses the ability of same-sex couples to marry and, applying strict scrutiny, concluded that even assuming that Indiana's interest in what the State termed "responsible procreation" was sufficiently important, the marriage ban was not "closely tailored" to that interest. *Id.* at 83a-97a. In its equal protection analysis, the District Court found that the marriage ban discriminates based on sexual orientation and, after recognizing that the State had offered "no reason why excluding same-sex couples from marriage benefits opposite-sex couples," concluded that the marriage ban failed rational basis review. *Id.* at 90a-99a. Finally, the District Court also found that the Equal Protection Clause precludes Indiana from refusing to recognize the marriages that same-sex couples enter into in other states. *Id.* at 99a-102a. The District Court permanently enjoined the State from enforcing the Indiana marriage ban either to deny marriage to

² The District Court granted the Governor of the State of Indiana summary judgment in *Lee* and *Fujii*, finding that he should not be a party to the proceedings. Given that the still-existing Defendants, both state and local, were adequate to ensure complete relief to Respondents, this issue was not pursued on appeal.

same-sex couples, or to deny recognition of their valid marriages same-sex couples entered into in other states. *Id.* at 103a-108a.

2. *The Seventh Circuit Decision*

Petitioners appealed the District Court's decision to the Seventh Circuit. On September 4, 2014, the Seventh Circuit unanimously affirmed the District Court.³ App. 3a-48a. Without reaching the issue under the Due Process Clause, the Seventh Circuit concluded that Indiana's marriage ban violates the Equal Protection Clause. *Id.* at 18a. Recognizing that "this is a case in which the challenged discrimination is . . . along suspect lines," the Seventh Circuit applied elevated scrutiny, requiring "a compelling showing that the benefits of the discrimination to society as a whole clearly outweigh the harms to its victims," but ultimately held that marriage ban could not survive any standard of review. *Id.* at 6a-7a (internal quotation marks omitted).

The Seventh Circuit analyzed whether sexual orientation constitutes a suspect classification in a manner that both converges with and tracks the approach taken by this Court in applying heightened scrutiny. *Id.* at 46a-47a (citing approvingly the description of this Court's analysis in *Windsor* by the

³ On appeal, this case was consolidated solely for argument and disposition with *Wolf v. Walker*. The Seventh Circuit's opinion in this case also struck down the Wisconsin marriage ban, which was at issue in that case.

Ninth Circuit in *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 483 (9th Cir. 2014)). Rather than presume the constitutionality of the ban, the court analyzed the “fit” between the classification and the governmental objective by weighing the degree of harm or intrusion imposed on the individuals burdened by the challenged law, just as this Court routinely has done, *see, e.g., Windsor*, 133 S. Ct. at 2696; *United States v. Virginia*, 518 U.S. 515, 531-33 (1996). In doing so, the Seventh Circuit took into account factors examined by this Court in determining whether a particular classification is suspect and therefore triggers heightened equal protection scrutiny.⁴ As the Seventh Circuit explained, the difference between its approach and the more conventional heightened scrutiny approach “is semantic rather than substantive.” App. 9a.

Writing for the Seventh Circuit, Judge Posner recognized that while the three cases challenging Indiana’s marriage ban are formally “about discrimination against the small homosexual minority in the United States,” “at a deeper

⁴ This Court has found a classification to be suspect where the targeted group has experienced a history of discrimination, *e.g., Frontiero v. Richardson*, 411 U.S. 677 (1973), that is not based on the group’s ability to contribute to society, *e.g., City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985). This Court has also considered whether the trait is immutable, *Mathews v. Lucas*, 427 U.S. 495, 506 (1976), and, although not part of the Seventh Circuit’s analysis, whether the group has the ability to protect itself through the political process, *Frontiero*.

level . . . they are about the welfare of American children.” *Id.* at 4a. The Seventh Circuit went on to note that while “enhanc[ing] child welfare” was the “single ground” for Indiana’s refusal to allow same-sex couples to marry, *id.* at 19a, this rationale “is so full of holes that it cannot be taken seriously”—because “[t]o the extent that children are better off in families in which the parents are married, they are better off whether they are raised by their biological parents or by adoptive parents.” *Id.* at 11a.

The Seventh Circuit found that by prohibiting marriage for same-sex couples and by refusing to recognize such marriages from other states, Indiana “discriminat[ed] against homosexuals by denying them a right that [it] grant[s] to heterosexuals, namely the right to marry an unmarried adult of their choice.” *Id.* at 12a. The court also recognized that the harm to lesbian and gay people and to their adopted children from the denial of this right is “considerable.” *Id.* at 14a. It noted that “[m]arriage confers respectability on a sexual relationship,” and that denial of the right to marriage “is a source of continuing pain to the homosexual community.” *Id.* at 14a-15a. And the court also found that “[t]he tangible . . . benefits of marriage, which (along with the psychological benefits) enure directly or indirectly to the children . . . are also considerable”—listing, for example, the right to file state and federal tax returns jointly, spousal support obligations, protections for marital property upon the death of a spouse, social security benefits, and more. *Id.* at 15a-16a. In discussing the denial of benefits to

same-sex couples, the court focused on *Windsor*, taking particular note of this “Court’s finding that denial of those benefits causes economic harm to children of same-sex couples,” and noting that “[t]he Court’s criticisms of such denial [of federal marital benefits] apply with even greater force to Indiana’s law.” *Id.* at 16a.

Given these various “tangible and intangible benefits of marriage,” the court found it “apparent that *groundless* rejection of same-sex marriage by government must be a denial of equal protection of the laws,” and that to prevail, the State must “establish a clearly offsetting governmental interest in that rejection.” *Id.* at 18a (emphasis in original). Again, the Seventh Circuit had no trouble finding that Indiana failed to make this showing. Indeed, the Seventh Circuit determined that passage of the Indiana marriage ban “suggests animus against same-sex marriage, as is further suggested by the state’s inability to make a plausible argument for its refusal to recognize same-sex marriage.” *Id.* at 33a.

Indiana argued that the “sole reason” for its marriage laws was “to try to channel unintentionally procreative sex into a legal regime in which the biological father is required to assume parental responsibility.” *Id.* at 19a-20a. But as the Seventh Circuit found, no justification—whether proffered by the state or not—withstood any level of constitutional scrutiny. For example, the court recognized that if encouraging responsible procreation was Indiana’s sole reason for marriage, “the state would not allow an infertile person to

marry”—but Indiana does permit infertile persons to marry, and in fact “carve[s] an exception to its prohibition against marriage of close relatives for first cousins 65 or older—a population guaranteed to be infertile[.]” *Id.* at 22a-23a. The Seventh Circuit suggested that “an unmarried homosexual couple is less stable than a married one,” and that given the State’s articulated interest in child welfare, “[t]he state should *want* homosexual couples who adopt children . . . to be married[.]” *Id.* at 28a-29a (emphasis in original). And the court recognized that limiting marriage to opposite-sex couples has not caused a drop in the percentage of children born to unmarried women, and that the statistical data in fact shows the opposite. *Id.* at 29a-30a.

Thus, after closely scrutinizing each argument offered by Indiana, and others, the Seventh Circuit found that none justified the denial of marriage to same-sex couples, concluding:

To return to where we started in this opinion, more than unsupported conjecture that same-sex marriage will harm heterosexual marriage or children or any other valid and important interest of a state is necessary to justify discrimination on the basis of sexual orientation. As we have been at pains to explain, the grounds advanced by Indiana . . . for [its] discriminatory policies are not only conjectural; they are totally implausible.

Id. at 46a.

ARGUMENT

Respondents believe the Seventh Circuit was wholly correct in its decision. Nonetheless, Respondents agree that the Court should grant review in this case. The questions presented by this case are of exceptional importance to Respondents and the nation and should be resolved expeditiously. Additionally, this particular case presents an excellent vehicle to review the constitutional issues presented.

**I. **THOUGH THE SEVENTH CIRCUIT
CORRECTLY HELD THAT INDIANA’S
MARRIAGE BAN VIOLATES THE
CONSTITUTION, THE QUESTION
PRESENTED IS OF EXCEPTIONAL
IMPORTANCE AND THE COURT
SHOULD ACCEPT REVIEW SO THAT IT
MAY BE RESOLVED EXPEDITIOUSLY.****

With its decision, the Seventh Circuit joined the emerging and overwhelming consensus of courts recognizing that the Constitution requires states to treat same-sex couples and their families with equal dignity and respect—and thus holding that states must allow same-sex couples to marry, and likewise must recognize same-sex couples’ lawful marriages performed in other jurisdictions. Respondents submit that the Seventh Circuit reached the correct result in a decision that is soundly reasoned and

firmly rooted in this Court’s equal protection precedent.

Of particular importance to whether *certiorari* is warranted, the Seventh Circuit decision eloquently articulated the “considerable” dignitary harm perpetuated by the State’s discrimination:

Marriage confers respectability on a sexual relationship; to exclude a couple from marriage is thus to deny it a coveted status. . . . [Denying] marriage rights to same-sex couples is a source of continuing pain [Allowing same-sex couples to marry] will enhance the status of these marriages in the eyes of other Americans, and in the long run it may convert some of the opponents of such marriage by demonstrating that homosexual married couples are in essential respects, notably in the care of their adopted children, like other married couples.

App. 14a-15a. Similarly, the Seventh Circuit recognized “[t]he tangible as distinct from the psychological benefits of marriage, which (along with the psychological benefits) enure directly or indirectly to the children of the marriage, whether biological or adopted”—among them in Indiana:

[T]he right to file state tax returns jointly, Ind. Code § 6-3-4-2(d); the marital testimonial privilege, § 34-46-3-

1(4); spousal-support obligations, § 35-46-1-6(a); survivor benefits for the spouse of a public safety officer killed in the line of duty, § 36-8-8-13.8(c); the right to inherit when a spouse dies intestate, § 29-1-2-1(b), (c); custodial rights to and child support obligations for children of the marriage, and protections for marital property upon the death of a spouse. §§ 12-15-8.5-3(1); 12-20-27-1(a)(2)(A).

Id. at 15a. Myriad federal benefits also flow from the state’s recognition of marriage. *See id.* at 15a-16a.

There is little doubt this case presents “an important question of federal law that has not been, but should be, settled by this Court.” S. CT. R. 10(c). At stake is whether states may, within constitutional parameters, relegate same-sex couples’ relationships to a “second-tier” status, and by doing so “demean[] the couple” and “humiliate[] . . . children now being raised by same-sex couples,” *Windsor*, 133 S. Ct. at 2694, or, conversely, whether the essential protections of the Fourteenth Amendment demand the equal dignity of lesbians and gay people, such that same-sex couples and their children are entitled to the status and benefits of marriage, just like other families. No less at issue, as the Seventh Circuit recognized, is the welfare of American children, App. at 4a, 47a, specifically those children whose parents would like to marry but, due to laws like Indiana’s marriage ban, cannot, or whose parents have already

married in another jurisdiction but Indiana law does not allow recognition of their marriage.

**II. THIS CASE PROVIDES A
SUBSTANTIVELY AND
PROCEDURALLY APPROPRIATE
VEHICLE TO RESOLVE THE
CONSTITUTIONAL QUESTION
PRESENTED.**

Respondents agree with Petitioners that this case is an excellent vehicle for the Court to decide the constitutional issue presented, both substantively and procedurally. Substantively, the Seventh Circuit decision below goes “to the heart of equal protection doctrine,” App. at 9a, finding the challenged statutes to be “constitutionally suspect” and applying a heightened level of scrutiny, *id.* at 6a. The opinion addresses the history of discrimination against gays and lesbians (“homosexuals are among the most stigmatized, misunderstood, and discriminated-against minorities in the history of the world,” *id.* at 14a-15a), the immutability of sexual orientation (“there is little doubt that sexual orientation, the ground of the discrimination, is an immutable (and probably an innate, in the sense of in-born) characteristic rather than a choice,” *id.* at 12a), and the overinclusive/underinclusive aspects of the law, *id.* at 22a, 47a. The Seventh Circuit also thoroughly analyzes the harm Indiana inflicts on the state’s children by excluding lesbian and gay couples from marriage. *See id.* at 29a (“The state should *want* homosexual couples who adopt children—as, to

repeat, they are permitted to do—to be married”) (emphasis in original). Unique among the petitions currently pending before this Court, this case resolves the constitutional question based on equal protection grounds, with a comprehensive analysis of the unequal exclusion of same-sex couples from marriage and the unequal refusal by Indiana to recognize their out-of-state marriages.

This case is also procedurally appropriate for review. The marriage ban has been vigorously defended throughout the litigation by both Indiana Attorney General Zoeller (who is responsible for enforcing the marriage ban, and who has defended the ban on behalf of himself as well as various state agencies), and local county clerks, who are responsible for issuing marriage licenses. As a result, the case is free of any jurisdictional complications. Finally, granting *certiorari* would provide the Court with briefing and oral argument reflecting the collective experience of counsel for Respondents, whose organizations have litigated seminal cases involving the rights of lesbian and gay men decided by this Court, including as party counsel in *Romer v. Evans*, 517 U.S. 620 (1996), *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Windsor*. Petitioners are represented by the Indiana Solicitor General, who has significant experience enforcing and defending the laws of Indiana, and who has participated as the primary author of *amicus curiae* briefs submitted in numerous marriage cases around the country, including *Windsor*. The collective experience of counsel on

both sides of the case will aid the Court in resolving the momentous constitutional questions at stake.

III. THE SEVENTH CIRCUIT CORRECTLY HELD THAT THE INDIANA MARRIAGE BAN IS UNCONSTITUTIONAL.

If this Court grants review, it should affirm the Seventh Circuit's decision, which correctly held that the Indiana marriage ban unconstitutionally discriminates against same-sex couples, unlawfully relegating their families to second-class status.

First, the Seventh Circuit rightly applied heightened scrutiny after explaining that “this is a case in which the challenged discrimination is . . . along suspect lines.” App. 6a (internal quotation marks omitted). The panel correctly recognized this country's significant history of discrimination and stigmatization directed at lesbians and gay men, and that sexual orientation is an immutable characteristic that is not relevant to a person's ability to participate in society. *Id.* at 12a-15a. The Seventh Circuit's analysis converges with the analysis applied by this Court in cases applying heightened scrutiny. *See generally Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987).

Second, the Seventh Circuit correctly assessed that Indiana's marriage ban fails even rational basis review. It explained, speaking of both the Indiana and Wisconsin cases:

Our pair of cases is rich in detail but ultimately straightforward to decide.

The challenged laws discriminate against a minority defined by an immutable characteristic, and the only rationale that the states put forth with any conviction—that same-sex couples and their children don’t *need* marriage because same-sex couples can’t *produce* children, intended or unintended—is so full of holes that it cannot be taken seriously. To the extent that children are better off in families in which the parents are married, they are better off whether they are raised by their biological parents or by adoptive parents. The discrimination against same-sex couples is irrational, and therefore unconstitutional even if the discrimination is not subjected to heightened scrutiny”

App. 11a. The Seventh Circuit additionally gave thoughtful treatment to additional conceivable bases on which the State might have attempted to defend the marriage ban (some of which were advanced by Wisconsin in the companion case). The panel rightly found that neither tradition, *id.* at 33a-38a, unforeseen consequences, *id.* at 38a-45a, deference to the democratic process, *id.* at 45a-46a, nor theoretical harm to the institution of marriage, *id.* at 34a, could justify the ban, and that it necessarily is irrational and violates basic equal protection principles.

Finally, because the Seventh Circuit found that the Indiana marriage ban violates the Equal Protection Clause, it did not reach the question of whether the Indiana marriage ban violates the Due Process Clause and the fundamental right to marry protected therein. *Id.* at 18a. Nor did the Seventh Circuit reach Respondents' arguments that the marriage ban discriminates on the basis of sex. These arguments, all argued in both the District Court and on appeal, provide additional grounds on which to affirm the decision below.

CONCLUSION

The State's petition for a writ of certiorari should be granted.

Respectfully submitted.

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