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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Due Process and Equal Protection Clauses of the Fourteenth Amendment permit States to define marriage as a legal union between one man and one woman.

2. Whether the Due Process and Equal Protection Clauses permit States to treat as void same-sex marriages from other jurisdictions.

PARTIES TO THE PROCEEDING

Petitioners are: Penny Bogan, as Clerk of Boone County, Indiana; Gregory F. Zoeller, as Attorney General of Indiana; William C. VanNess II, M.D., as Commissioner of the Indiana State Department of Health; Mike Alley, as Commissioner of the Indiana Department of Revenue; Steve Russo, as Executive Director of the Indiana Public Retirement System; and Brian Abbott, Chris Atkins, Ken Cochran, Steve Daniels, Jodi Golden, Michael Pinkham, Kyle Rosebrough, and Bret Swanson, as Members of the Board of Trustees of the Indiana Public Retirement System.

Respondents are: Marilyn Rae Baskin; Esther Fuller; Bonnie Everly; Linda Judkins; Dawn Carver; Pamela Eanes; Henry Greene, Glenn Funkhouser, and their minor child C.A.G.; Nikole Quasney, Amy Sandler, and their minor children A.Q.-S. and M.Q.-S.; Midori Fujii; Melody Layne; Tara Betterman; Scott Moubray-Carrico, Rodney Moubray-Carrico, and their minor child L.M.-C.; Monica Wehrle; Harriet Miller; Gregory Hasty; Christopher Vallero; Rob MacPherson, Steven Stolen, and their minor child A.M.-S.; Pamela Lee; Candace Batten-Lee; Teresa Welborn; Elizabeth J. Piette; Ruth Morrison; Martha Leverett; Karen Vaughn-Kajmowicz, Tammy Vaughn-Kajnowicz, and their minor children J.S.V., T.S.V., and T.R.V.

Other parties including Lisbeth Borgman, as Clerk of Allen County, Indiana; Peggy Beaver, as

Clerk of Hamilton County, Indiana; Michael A. Brown, as Clerk of Lake County, Indiana; and Karen M. Martin, as Clerk of Porter County, Indiana, were defendants in the district court. Clerks Brown and Martin did not appeal from the final judgment. Clerk Beaver initially appealed from the final judgment, but subsequently dismissed her appeal. Clerk Borgman appealed to the Seventh Circuit but has elected not to join this Petition.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Cases [Cont'd]

Cases [Cont'd]

Cases [Cont'd]

Federal Statutes

State Statutes

Constitutional Provisions

Other Authorities

PETITION FOR WRIT OF CERTIORARI

Penny Bogan, as Clerk of Boone County, Indiana; Gregory F. Zoeller, as Attorney General of Indiana; William C. VanNess II, M.D., as Commissioner of the Indiana State Department of Health; Mike Alley, as Commissioner of the Indiana Department of Revenue; Steve Russo, as Executive Director of the Indiana Public Retirement System; and Brian Abbott, Chris Atkins, Ken Cochran, Steve Daniels, Jodi Golden, Michael Pinkham, Kyle Rosebrough, and Bret Swanson, as Members of the Board of Trustees of the Indiana Public Retirement System, all respectfully petition the Court to grant a writ of certiorari to the United States Court of Appeals for the Seventh Circuit in these consolidated cases.

OPINIONS BELOW

This petition arises from multiple cases presenting precisely the same issues filed nearly simultaneously in the United States District Court for the Southern District of Indiana and assigned to the same judge, namely, *Baskin v. Bogan*, No. 1:14-cv-355-RLY-TAB, *Fujii v. Governor*, No. 1:14-cv-404-RLY-TAB, and *Lee v. Pence*, No. 1:14-cv-406-RLY-MJD. The district court did not formally consolidate the cases, but after entering a temporary restraining order and preliminary injunction as to certain plaintiffs in *Baskin*, the court ordered the three cases briefed on summary judgment in short succession. The district court then issued a

consolidated summary judgment memorandum opinion.[1] All Petitioners (Defendants in the three separate district court cases) filed separate notices of appeal the same day. The cases were separately docketed before the Seventh Circuit on June 26, 2014, as *Baskin v. Bogan*, No. 14-2386, *Fujii v. Commissioner*, No. 14-2387, and *Lee v. Abbott*, No. 14-2388. On June 27, 2014, the Seventh Circuit ordered the three Indiana cases formally consolidated. App. 63a.

Meanwhile, a case presenting similar challenges to Wisconsin's marriage definition was pending before the United States District Court for the Western District of Wisconsin, which entered a judgment in favor of plaintiffs on June 6, 2014. *Wolf v. Walker*, 986 F. Supp. 2d 982 (W.D. Wis. 2014).

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[1] Two other cases challenging Indiana's traditional marriage definition, *Love v. Pence*, No. 4:14-cv-15-RLY-TAB, and *Bowling v. Pence*, No. 1:14-cv-405-RLY-TAB, were also filed around the same time as *Baskin*, *Fujii*, and *Lee* and assigned to the same district judge. However, the district court dismissed the *Love* case for failing to name a suitable defendant (although plaintiffs have filed a motion for reconsideration). *Love v. Pence*, No. 4:14-cv-15-RLY-TAB, 2014 WL 2881569 (S.D. Ind. June 25, 2014). And the district court did not include *Bowling* in its summary judgment memorandum opinion of June 25, 2014. The Court later entered judgment for plaintiffs in that case on August 19, 2014. *Bowling v. Pence*, No. 1:14-cv-405-RLY-TAB, 2014 WL 4104814 (S.D. Ind. Aug. 19, 2014). An appeal of that judgment is pending, but briefing has been ordered held in abeyance. Order, *Bowling v. Pence*, No. 14-2854, Doc. No. 6 (7th Cir. Aug. 25, 2014).

That case was docketed in the Seventh Circuit on July 11, 2014 as *Wolf v. Walker*, No. 14-2526.

The Seventh Circuit did not formally consolidate the Indiana and Wisconsin cases for briefing, but on July 11, 2014, issued an order consolidating the cases for argument and disposition. Order, *Baskin v. Bogan*, Nos. 14-2386, 14-2387, 14-2388, Doc. No. 27 (7th Cir. July 11, 2014).

Against this procedural backdrop, the opinions below are as follows:

The district court's April 18, 2014, Entry on Plaintiffs' Motion for a Temporary Restraining Order in *Baskin v. Bogan*, No. 1:14-cv-355-RLY-TAB, is unpublished and is reprinted in the appendix at 126a. The district court's May 8, 2014, Entry on Plaintiffs' Motion for a Preliminary Injunction in *Baskin v. Bogan*, No. 1:14-cv-355-RLY-TAB, is published at 983 F. Supp. 2d 1021 (S.D. Ind. 2014), and is reprinted in the appendix at 109a. The June 25, 2014, consolidated memorandum opinion of the district court in *Baskin v. Bogan*, No. 1:14-cv-355-RLY-TAB, *Fujii v. Governor*, No. 1:14-cv-404-RLY-TAB, and *Lee v. Pence*, No. 1:14-cv-406-RLY-MJD, is not yet published, but is available at 2014 WL 2884868 and is reprinted in the appendix at 66a. The Seventh Circuit's September 4, 2014, opinion addressing both *Baskin v. Bogan*, Nos. 14-2386, 14-2387, 14-2388, and *Wolf v. Walker*, 14-2526, is not

yet published, but is available at 2014 WL 4359059 and is reprinted in the appendix at 3a.

JURISDICTION

The Court of Appeals entered final judgment on September 4, 2014. App. 1a. The Court has jurisdiction to review this case under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV, § 1

> "No State shall . . . 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."

Ind. Code § 31-11-1-1

> (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.

INTRODUCTION

There can be little doubt about the cert-worthiness of the issues presented in this case, *i.e.*, whether the Fourteenth Amendment requires States to define marriage to include same-sex couples or recognize same-sex marriages from other States. The main question at this point is which case or cases present the best vehicle(s) for the efficient and complete resolution of these issues that the Nation needs. The Court has already tried to address the same-sex marriage issue once, but was stymied by a background political drama that ultimately deprived the Court of a suitable party willing to defend traditional marriage. *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013). Particularly given the national upheaval and confusion over this issue that has occurred in the wake of *United States v. Windsor*, 133 S. Ct. 2675 (2013), this time around the Court will no doubt choose with special care the case or cases it uses to reach the merits.

The Court has before it an assortment of cases presenting the same-sex marriage issues in slightly different postures. All but this one, however, have vehicle shortcomings that should not be taken lightly. As discussed in more detail later in the Petition, of the same-sex marriage cert petitions currently pending before the Court, only this case embodies *all* of the following features:

1. As parties willing to defend traditional marriage, both a County Clerk who actually issues marriage licenses *and* State Officials directly responsible for relief demanded by Plaintiffs, *e.g.*, creating forms, accepting tax returns, and covering pension beneficiaries.

2. As counsel for state defendants, a State Attorney General committed to and experienced in the defense of traditional marriage.

3. As issues to be resolved, not only claims for marriage licenses, but also concrete claims for interstate recognition of same-sex marriages, brought under both the Due Process Clause and the Equal Protection Clause.

4. A longstanding, strictly statutory definition of marriage, providing no questions concerning whether it was sufficient for Plaintiffs to challenge only the constitutional definition but not the statutory definition.

5. No state-conferred same-sex domestic partner or civil union recognition or benefits that might preclude the Court from arriving at a nationally relevant resolution.

Moreover, if the Court determines that it would be best to address the same-sex marriage issues through multiple cases, this case has an additional

feature that recommends it for inclusion. The Seventh Circuit invalidated Indiana's law on equal protection grounds only, on the grounds that traditional marriage definitions discriminate against homosexuals. In that regard it stands in conflict with the reasoning and result in *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 868-69 (8th Cir. 2006), but, perhaps more important, it provides an equal protection foil to the fundamental-rights methodology used to strike down States' laws in the other same-sex marriage cases pending before the Court, *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014), *Bishop v. Smith*, Nos. 14-5003, 14-5006, 2014 WL 3537847 (10th Cir. July 18, 2014), and *Bostic v. Schaefer*, Nos. 14-1167, 14-1169, 14-1173, 2014 WL 3702493 (4th Cir. July 28, 2014). This feature, coupled with the Seventh Circuit's unorthodox equal protection analysis, makes this case a particularly good vehicle for addressing the equal protection issue.

STATEMENT

I. Indiana's Traditional Marriage Law

While Indiana's current marriage-definition statute was enacted in 1997, Indiana has always defined marriage as the union of one man and one woman and has never licensed, recognized, or regulated same-sex marriages. Initially, marriage was left to common law, but by 1818—only two years after Indiana became a State—the legislature had

defined marriage as a matter of statutory law as an opposite-sex institution. *See* Act of Jan. 26, 1818, § 1, Laws of the State of Indiana 224 (1818) ("That male persons of the age of fourteen years, and female persons of the age of twelve years . . . may be joined in marriage.").

Indiana has preserved its man-woman definition of marriage for nearly two centuries. Before 1986, a statute provided that "[a] male who has reached his seventeenth birthday may marry a female who has reached her seventeenth birthday . . . ." Ind. Code § 31-1-1-1. From 1986 to 1997, it said that "[o]nly a female may marry a male[, and o]nly a male may marry a female." Pub. L. No. 180-1986, § 1, 2 Acts 1986 1800 (codified at Ind. Code § 31-7-1-2). In 1997, the legislature re-enacted this exact wording at Indiana Code Section 31-11-1-1(a), Pub. L. No. 1-1997, § 3, and added that "[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." Pub. L. No. 198-1997, § 1 (codified at Ind. Code § 31-11-1-1(b)).

II. Respondents

Plaintiffs in the *Baskin* case comprise five same-sex couples and three minor children of two of the couples. Four of the couples are not married and sought injunctions related to licensure of same-sex marriages that would do the following: (1) require the Commissioner of the Indiana State Department

of Health to promulgate marriage license forms designed to accommodate same-sex couples; (2) prohibit the Attorney General from prosecuting clerks who issue marriage licenses to same-sex couples; and (3) direct the defendant Clerks themselves to issue marriage licenses to same-sex couples. The fifth couple, Nikole Quasney and Amy Sandler, sought immediate recognition of their Massachusetts marriage primarily because Quasney suffers from Stage IV ovarian cancer. They also demanded an injunction requiring the Department of Health to issue, upon Quasney's passing, a certificate of death that denotes her as married and that lists Sandler as her spouse.

Plaintiffs in the *Fujii* case comprise one surviving member of a same-sex couple, five same-sex couples and two minor children of two of the couples. Fujii sought an inheritance tax refund of $300,000 for taxes paid on property inherited from her late same-sex spouse. Two couples were not married—both couples married in the interim after the district court issued its final judgment and before the Seventh Circuit granted a stay—and sought marriage licenses from the defendant Clerks. Three couples legally married in other jurisdictions wished to have their out-of-state marriages recognized in Indiana. All Plaintiffs sought injunctions directing the Commissioner of the Indiana State Department of Health to change all appropriate forms to recognize same-sex marriage applications and marriages, and directing the Commissioner of the

Indiana Department of Revenue to allow same-sex spouses to file state income-tax returns in the same manner as opposite-sex spouses.

Plaintiffs in the *Lee* case comprise four same-sex couples who legally married in other jurisdictions. One member of each of the couples is currently serving or has served in the past as a public safety officer. Accordingly, all four women are members of the 1977 Police Officers' and Firefighters' Pension and Disability Fund and have unsuccessfully sought to designate their same-sex partners as their "surviving spouses" for death benefit purposes. They sought an injunction against the members of the Board of Trustees and Executive Director of the Indiana Public Retirement System that would enable such designations.

III. District Court Proceedings

On March 10 and 14, 2014, Respondents filed suit against state and local officials, alleging among other claims that Indiana's traditional marriage law violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The first focus of the district court's attention was a motion for temporary restraining order and preliminary injunction filed by Nikole Quasney and Amy Sandler, two plaintiffs in the *Baskin* case who had been married in Massachusetts on August 29, 2013. App. 110a. As noted, Quasney suffers from Stage IV ovarian cancer. She and Sandler sought an

injunction requiring defendants generally to "recognize" their marriage, and specifically to require Petitioner VanNess, Commissioner of the State Department of Health, to ensure that upon Quasney's passing her certificate of death would note that she was married and that Sandler was her spouse. App. 111a. The district court first entered a TRO, App. 138a, and then a preliminary injunction granting the relief requested, App. 124a-125a. The *Baskin* defendants immediately appealed to the Seventh Circuit, but the district court entered final judgment in *Baskin*, *Fujii*, and *Lee* before the Seventh Circuit could hear that appeal from the preliminary injunction order. Upon the parties' motion, the Seventh Circuit dismissed this first appeal as moot on July 14, 2014. App. 51a-52a.

In its entry on summary judgment, the district court rejected the argument that it was bound by *Baker v. Nelson*, 409 U.S. 810 (1972), which summarily dismissed a Fourteenth Amendment challenge to Minnesota's traditional marriage definition as not raising a "substantial federal question." The court acknowledged that *Baker* was both a disposition on the merits and exactly on point, but said that "when doctrinal developments indicate, lower courts need not adhere to the summary disposition." App. 79a (citation and internal quotation marks omitted). The district court concluded, in effect, that *Baker* had been overruled by *Romer v. Evans*, 517 U.S. 620 (1996), *Lawrence v.*

Texas, 539 U.S. 558 (2003), and *United States v. Windsor*, 133 S. Ct. 2675 (2013).

Aside from *Baker*, the district court declared Indiana's traditional man-woman definition of marriage unconstitutional as a violation of the fundamental right to marry. App. 90a. It held that the right to marry as recognized in cases such as *Turner v. Safley*, 482 U.S. 78 (1987), *Loving v. Virginia*, 388 U.S. 1 (1967), and *Zablocki v. Redhail*, 434 U.S. 374 (1978), "includes the right of the individual to marry a person of the same sex." App. 88a. The district court applied a strict scrutiny analysis requiring the State to prove "sufficiently important state interests" underlying its traditional definition of marriage while also showing that this definition is "closely tailored to effectuate only those interests." App. 89a (citation omitted).

The court assumed that encouraging opposite-sex couples to stay together for the sake of unintended children that their sexual union may create was a sufficiently important interest underlying traditional marriage, but held that the law was not closely tailored to that interest. App. 89a-90a. It said that the law was "over-inclusive" because it prohibits some opposite-sex couples who can procreate from marrying (such as kin) and "under-inclusive" because it prevents only those who cannot naturally conceive children from marrying. *Id.*

The district court separately considered whether Indiana's traditional marriage definition violated the Equal Protection Clause. The court determined that Indiana's law discriminates based on sexual orientation, App. 93a, but said it would follow the rational basis standard in light of Seventh Circuit precedent holding that sexual orientation is not a suspect class, App. 94a. The court, having earlier accepted *arguendo* the State's explanation that the governmental purpose of marriage is to channel couples that are able to procreate into stable relationships, now determined that instead the purpose of marriage is "to keep the couple together for the sake of their children," and concluded that with such a purpose in mind, no rational basis existed for excluding same-sex couples from marriage. App. 98a-99a (holding that "the ability to conceive unintentionally is too attenuated to support such a broad prohibition").

Finally, the district court held that Indiana's statute declaring out-of-state same-sex marriages void violated the Equal Protection Clause. App. 101a-102a. In the district court's view, that law singled out one group for disparate treatment and was both motivated by animus and without rational connection to any legitimate purpose. *Id.*

IV. Seventh Circuit Decision

In a 40-page opinion written by Judge Posner and issued just nine days following oral argument, the Seventh Circuit affirmed and held that Indiana's traditional marriage definition violates the Equal Protection Clause. The court did not separately address the Due Process Clause claim.

Like the district court, the Seventh Circuit, despite acknowledging that *Baker v. Nelson*, 409 U.S. 810 (1972), was a "decision . . . on the merits and so binds lower courts" on the same-sex marriage issue, felt no obligation to follow *Baker* because "doctrinal developments indicate otherwise." App. 18a (citation omitted). The court conceded that "[s]ubsequent decisions such as [*Romer*, *Lawrence*, and *Windsor*] are distinguishable from the present [] cases," yet without further explanation concluded that those cases "make clear that *Baker* is no longer authoritative." App. 19a.

Without any analysis of the issue, the court treated Indiana's traditional marriage definition, which has existed for hundreds of years and which contains no mention of sexual orientation, as facial discrimination against homosexuals. App. 4a. Then, eschewing traditional equal protection doctrine, the court employed its own four-step analysis, in relevant part:

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 . . . ?

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. 7a-9a.

The court apparently took this approach in order to focus its discussion on the perceived harms created by traditional marriage definitions, admitting that "those harms don't formally enter into the conventional analysis." App. 10a. It

determined that, by adhering to its longtime traditional marriage definition, Indiana is "discriminating against homosexuals by denying them a right [it] grant[s] to heterosexuals, namely the right to marry an unmarried adult of their choice." App. 12a. The court characterized homosexuals as "among the most stigmatized, misunderstood, and discriminated-against minority in the history of the world," with traditional marriage definitions causing "continuing pain to the homosexual community." App. 14a-15a. Accordingly, it implied that some form of heightened scrutiny should apply. App. 6a-7a.

The court rejected as insincere—actually, "totally implausible," App. 46a—Indiana's argument that traditional marriage is justified by reference to a need to channel procreative sex (an interest that does not extend to same-sex couples). "The states' concern with the problem of unwanted children is valid and important," the court said, "but their solution is not 'tailored' to the problem, because by denying marital rights to same-sex couples it reduces the incentive of such couples to adopt unwanted children and impairs the welfare of those children who are adopted by such couples." App. 47a.

Indiana's definition of marriage is also "underinclusive," the court said, "in allowing infertile heterosexual couples to marry, but not same-sex couples." App. 47a-48a. If the State's

responsible procreation theory for marriage were serious, the court said, Indiana would set marriage licenses to expire at the age of infertility. App. 22a. The court observed that Indiana allows first cousins 65 or older to marry, *i.e.*, "*only after* they are provably infertile." App. 24a. This particular allowance, the court said, both disproves the State's concern for channeling procreative sex and constitutes an "insidious form of discrimination" vis-a-vis same-sex couples. *Id.*

The court also deemed unreasonable the argument that marriage for infertile opposite-sex couples deters a fertile member from engaging in seriatim sexual relationships that could yield unintentional babies. App. 22a-23a. In the court's view, a fertile member of an infertile couple would not seek a fertile outside partner without providing adequately for a resulting child. App. 23a. The court also rejected the argument that, through marriage, even infertile opposite-sex couples model optimal behavior to potentially fertile opposite-sex couples because fertile couples do not learn child-rearing from infertile couples. *Id.*

The court opined that if the State's primary concern is "alleviating the problem of 'accidental births,'" App. 25a, it has made a bad policy choice that does not advance its goals. App. 29a-30a. "Overlooked" by the State, the court said, "is that many [] abandoned children are adopted by homosexual couples, and those children would be

better off both emotionally and economically if their adoptive parents were married." App. 5a. In the court's view, same-sex marriage would not only benefit adopted children of same-sex couples, but would also reduce the number of abortions by making adoption a more viable option for expectant mothers. App. 27a-28a. Besides, said the court, if traditional marriage were advancing the State's interests in reducing unintended procreation by unmarried couples, the percentage of children born to unmarried persons would not be on the rise, as it has been (according to non-record sources) since the State re-enacted its traditional marriage definition in 1997. App. 29a-30a.

The court also rejected the argument that traditional marriage definitions are valid because "'thousands of years of collective experience has [*sic*] established traditional marriage, between one man and one woman, as optimal for the family, society, and civilization.'" App. 37a. The problem with this argument, the court said, is that "[n]o evidence in support of the claim of optimality is offered, and there is no acknowledgment that a number of countries permit polygamy—Syria, Yemen, Iraq, Iran, Egypt, Sudan, Morocco, and Algeria—and that it flourishes in many African countries that do not actually authorize it, as well as in parts of Utah." *Id.* "But suppose the assertion is correct," the court wondered, "[h]ow does that bear on same-sex marriage?" *Id.* Justice Alito's concern in his *Windsor* dissent that no one can predict with

certainty the social impact of same-sex marriage is an insufficient response, the court said, because "[w]hat follows, if prediction is impossible?" App. 40a. The court concluded that no deference to legislative judgment was warranted, App. 40a-42a, for just as John Stuart Mill did not think polygamy "was a proper political concern of England," neither is same-sex marriage a proper concern of "heterosexuals." App. 42a.

REASONS FOR GRANTING THE PETITION

I. These Cases Present the Most Worry-Free, Comprehensive Vehicle Yet for Review of Core Same-Sex Marriage Issues

This case may present the cleanest vehicle yet for the Court to resolve core same-sex marriage issues. There are no defendant standing issues to distract from the core legal issues, and full redress is possible because Petitioners include not only a county clerk who issues marriage licenses, but also state officials with actual authority to confer concrete benefits of recognition (rather than mere general supervisory authority) in the event Respondents prevail. And the State's Attorney General, rather than attacking his own State's traditional marriage law, provides a robust defense of the law. What is more, both licensure of in-state marriages and recognition of out-of-state marriages have been thoroughly briefed and argued, and Indiana does not offer same-sex

couples a marriage-substitute such as domestic partnerships or civil unions that could complicate evaluation of the marriage issue.

A. There are no defendant standing problems in these cases

The divisive nature of same-sex marriage has created abundant political drama around the country—drama that unfortunately has affected litigation outcomes on numerous occasions. Politicians elected to offices that enforce some aspect of marriage law, often county clerks who issue marriage licenses, but also state officials with other (often nebulous) connections to marriage enforcement, have all too often abandoned defense of traditional marriage owing either to political pressure or their own personal beliefs. This occurred in litigation over California's Proposition 8, where both the Attorney General and the Governor of California (whose connection to enforcing marriage law was not clear in any event) refused to defend the law. The willingness of Proposition 8's backers to defend the law proved insufficient under Article III, and that lack of standing to appeal ultimately doomed resolution of the same-sex marriage issue. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2668 (2013).

This time around, the Court will of course wish to avoid a similar outcome. Yet official abdication of duty continues to plague appeals of same-sex marriage cases around the country. At least nine

attorneys general, from California, Illinois, Kentucky, Nevada, New Mexico, North Carolina, Oregon, Pennsylvania, and Virginia, have indicated that they will not defend their States' traditional marriage laws. Niraj Chokshi, *Seven Attorneys General Won't Defend Their Own State's Gay-Marriage Bans*, Wash. Post, Mar. 4, 2014, http://www.washingtonpost.com/blogs/govbeat/wp/2014/02/20/six-attorneys-general-wont-defend-their-own-states-gay-marriage-bans/; Christine Mai-Duc, *North Carolina Says It Will No Longer Defend Gay Marriage Ban in Court*, L.A. Times, July 28, 2014, http://www.latimes.com/nation/nationnow/la-na-nn-north-carolina-drops-opposition-same-sex-marriage-20140728-story.html; *AG King Won't Defend Ban on Gay Marriage*, Santa Fe New Mexican, July 23, 2013, http://www.santafenewmexican.com/news/local_news/article_7a23f6b6-f60b-5132-a955-d7aae976ee1f.html.

In addition, sometimes all county clerks named as defendants in a marriage case for their authority to issue marriage licenses have dropped out on appeal, such as in Utah and Kentucky. *Kitchen v. Herbert*, 755 F.3d 1193, 1202 (10th Cir. 2014); Notice of Appeal, *Bourke v. Beshear*, No. 3:13-CV-750-H, Doc. No. 68 (W.D. Ky. Mar. 18, 2014), *appeal docketed*, No. 14-5291 (6th Cir. Mar. 19, 2014).

Here, one of the Petitioners—indeed, the first-named defendant in the Baskin complaint—is an Indiana county clerk, from whom Respondents

Marilyn Rae Baskin and Esther Anne Fuller sought a marriage license. Decl. of Marilyn Rae Baskin at 1, 3-4, Decl. of Esther Anne Fuller at 2-3, *Baskin v. Bogan*, No. 1:14-cv-355-RLY-TAB, Doc. Nos. 36-1, 36-2 (S.D. Ind. Apr. 3, 2014). Plus, *all* of the state officials named in these cases remain as parties willing to defend traditional marriage. And there is no doubt as to whether these state officials are appropriate defendants. Each has been named based on a particular official responsibility for enforcing Indiana's marriage definition—enforcement that enables Respondents to allege the existence of concrete, particularized harm sufficient to satisfy Article III requirements.

For example, Respondents seeking marriage licenses allege harm not only from county clerks' refusal to grant them, but also from the State Health Commissioner's refusal to create appropriate forms for same-sex marriages. App. 106a-107a. Respondents seeking to file joint tax returns as a function of state recognition of their out-of-state same-sex marriages allege injury caused by the State Revenue Commissioner's refusal to accept those joint returns in accord with Indiana Code Section 31-11-1-1(b). App. 107a. And other Respondent couples married in other States who seek state pension beneficiary rights have sued officials who, in light of Indiana's definition of marriage and their responsibility for enforcing Indiana's pension laws, refuse to afford them those rights. App. 107a-108a.

In contrast, each of Respondents' claims against the Governor of Indiana failed because they could not identify any incident of marriage that the Governor himself enforces that would benefit them. App. 77a. Indeed, another same-sex marriage lawsuit filed *only* against the Governor of Indiana and no other defendants has so far failed entirely because there is no defendant in the case that can give the plaintiffs meaningful relief under Article III. *Love v. Pence*, No. 4:14-cv-15-RLY-TAB, 2014 WL 2881569 (S.D. Ind. June 25, 2014).

The value of having a variety of defendants both able to provide plaintiffs with some meaningful relief if they prevail, and willing to defend the marriage law, should not be overlooked. In Indiana's cases, there are no Article III or Eleventh Amendment questions over whether Respondents have sued only a figurehead defendant who, while willing to defend the statute, has no direct marriage-law-enforcement authority. There is no prospect that the Court would either have to address such jurisdictional questions (and possibly dismiss the case depending on the resolution) or ignore them and cast doubt over a significant and well-developed national doctrine holding that it is improper to sue state officials in federal court based only on their general supervisory powers or figurehead status. *See, e.g.*, *Shell Oil Co. v. Noel*, 608 F.2d 208, 211 (1st Cir. 1979); *Mendez v. Heller*, 530 F.2d 457, 460 (2d Cir. 1976); *1st Westco Corp. v. Sch. Dist. of Philadelphia*, 6 F.3d 108, 113-14 (3d Cir. 1993); *Okpalobi v. Foster*, 244 F.3d 405,

424-25, 427, 428 (5th Cir. 2001) (en banc); *Children's Healthcare Is a Legal Duty, Inc. v. Deters*, 92 F.3d 1412, 1416-18 (6th Cir. 1996); *Hearne v. Bd. of Educ. of Chicago*, 185 F.3d 770, 777 (7th Cir. 1999); *Sherman v. Cmty. Consol. Sch. Dist. 21 of Wheeling Twp.*, 980 F.2d 437, 441 (7th Cir. 1992); *Snoeck v. Brussa*, 153 F.3d 984, 986 (9th Cir. 1998); *Long v. Van de Kamp*, 961 F.2d 151, 152 (9th Cir. 1992).

B. There is no Attorney General alignment problem in these cases

As mentioned, the Attorney General of Indiana is not only a defendant and petitioner in these matters, but is also committed to defending Indiana's traditional marriage definition. His office has often authored amicus briefs on behalf of several States in same-sex marriage challenges around the country, including before this Court in *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), and *United States v. Windsor*, 133 S. Ct. 2675 (2013). His predecessor, for whom this Attorney General served as chief deputy, previously defended Indiana's traditional marriage definition against state constitutional attack. *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. Ct. App. 2005).

The Court is well aware of the value that State Attorneys General and their teams provide in cases challenging state laws. Only an Attorney General, as chief legal officer of a sovereign whose laws are before the Court, can have a team that draws on a

deep reservoir of institutional knowledge provided by client agencies and the State's electorate. And as the experience of *Hollingsworth* in part demonstrates, the alignment of a State's Attorney General as a defender of a State's traditional marriage law is critical to sound resolution of core same-sex marriage issues. It ensures not only that the appropriate, statewide chief legal officer has elected to make a defense, *see Hollingsworth*, 133 S. Ct. at 2667 (explaining that, unlike state officials, private entities are "free to pursue a purely ideological commitment to the law's constitutionality without the need to take cognizance of resource constraints, changes in public opinion, or potential ramifications for other state priorities"), but also that the precise arguments being offered to the Court have been vetted by an official who is subject to statewide political accountability.

Perhaps as important, it also ensures that the Court is not faced with confusion over who, in fact, represents the interests of the State. When an Attorney General stakes out a position against his own State's law before the Court, on the other hand, competing parties can make equally plausible claims to be voicing the State's interests. If the Court is to achieve a fully informed resolution of these complex and controversial legal issues, it must have the assurance that it is hearing an unfettered, un-contradicted articulation of state interests from the very official charged by law with advocating on behalf of those interests in court.

C. These cases present clean, all-inclusive depictions of *both* core same-sex marriage questions without also presenting confounding side issues

As should be clear, two core same-sex marriage issues have emerged from coordinated national litigation over the past year: Whether States can *define* marriage as a man-woman institution, and even if so, whether States must nonetheless *recognize* same-sex marriages from other States. It is important for the Court to resolve both issues simultaneously so that States will have a clear understanding of the extent of their authority to define marriage within their borders. These combined cases present both issues, as multiple Respondents seek Indiana-issued marriage licenses and others seek some form of recognition of out-of-state marriages. App. 70a, 105a-108a. Both the district court and the court of appeals addressed both types of claims and invalidated both Indiana's definition of marriage and its refusal to recognize same-sex marriages from other States. App. 4a, 48a, 105a.

It is also important, however, that as the Court addresses these core fundamental issues, it not be distracted by what in some traditional marriage States is an ancillary issue of tremendous magnitude: Whether same-sex couples may adopt jointly. In Virginia, for example, litigation over

whether the state may adhere to traditional marriage has been influenced by a statute that, because it requires joint or second-parent adopters to be married, effectively precludes same-sex couples from adopting. *Bostic v. Schaefer*, Nos. 14-1167, 14-1169, 14-1173, 2014 WL 3702493, at *5 n.4 (4th Cir. July 28, 2014). In Indiana, however, state courts have interpreted the adoption statutes to permit unmarried partners to obtain parental rights over the same child, such that Indiana permits adoption by same-sex couples. *In re Infant Girl W.*, 845 N.E.2d 229 (Ind. Ct. App. 2006). The Court could thus use this case to resolve the core marriage definition and recognition issues without worrying about whether it must also confront the equally contentious issue whether the Constitution requires States to permit joint adoption by same-sex couples.

Finally, the State does not afford marriage-like alternatives such as civil unions or domestic partnerships as a counterweight to its adherence to traditional marriage. *See* Ind. Code § 31-11-1-1(b). Through these cases, therefore, the Court will be able to address not merely whether States may adhere to traditional marriage in name only, but whether States may reserve a full panoply of benefits, burdens, and regulations typically associated with marriage to otherwise qualified opposite-sex couples. Such an opportunity will help the Court avoid the risk of providing one answer for civil union/domestic partnership States while potentially reserving a different answer for States

such as Indiana that afford no such alternative rights.

II. The Unorthodox, Overtly Policy-Driven Analysis of the Decision Below Warrants Direct Review

Another reason for using this case to address the two core same-sex marriage issues is that the decision below strayed far from this Court's Fourteenth Amendment doctrine. The Seventh Circuit, in an opinion by Judge Posner, expressly created its own four-part equal protection framework that presupposed the existence of the right being claimed and the existence of the classification being contested, declared that some nebulous form of heightened scrutiny applied, relied on the untested assertions of various amici "experts," and all at once declared that Indiana's traditional marriage definition also fails rational basis. Even aside from the Court's ultimate resolution of the same-sex marriage issues, if left undisturbed, the analysis employed below is likely to create substantial doctrinal confusion in any number of equal protection cases proceeding through the Seventh Circuit, including perhaps those where gay and religious rights collide.

1. The Seventh Circuit at first invoked the equal protection standard from *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993), that "[i]n 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. 5a (emphasis in 7th Cir. decision). Yet no sooner had the Court articulated the traditional *Beach* standard than it abandoned it, replacing it with its own novel construct (set forth *supra* in the Statement of the Case at Part IV), a largely economic analysis of the "costs and benefits" of the statutory provisions at issue. App. 9a-10a.

The court constructed its novel approach fully conscious that it was deviating from the tests articulated by this Court, claiming that "[t]he difference between the approach we take . . . and the more conventional approach is semantic rather than substantive." App. 9a. The court proceeded in this fashion, it said, in order to "go to the heart of equal protection doctrine," claiming its novel articulation is "consistent with the various formulas" that this Court has articulated and "capture[s] the essence of [this Court's] approach in heightened-scrutiny cases[.]" *Id.*

In applying its creation, however, the Seventh Circuit ignored vast swaths of controlling equal protection doctrine. For example, the decision below faulted the State for not proving the social utility of "rejection of same-sex marriage," as if it were an antecedent right. App. 18a. But the court expressly

refused to examine whether such a right existed under *any* standard, much less the rigorous fundamental rights standard articulated in *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (limiting fundamental rights status to rights that are "objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed" (citations and internal quotation marks omitted)); *see also United States v. Windsor*, 133 S. Ct. 2675, 2689 (2013) ("[U]ntil recent years, many citizens had not even considered the possibility that two persons of the same sex might [marry. M]arriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization."); Richard A. Posner, *Should There Be Homosexual Marriage? And If So, Who Should Decide?*, 95 Mich. L. Rev. 1578, 1579 (1997) ("[H]omosexual marriage has nowhere been a common practice, even in societies in which homosexuality was common.").

The court's demand that the State prove an objective for "refusing to authorize" same-sex marriage also ignored the Court's teaching that the State may justify limits on government benefits and burdens by reference to whether *including* additional groups would accomplish the government's underlying objectives. *Johnson v. Robison*, 415 U.S. 361, 383 (1974) ("When . . . the

inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not, we cannot say that the statute's classification of beneficiaries and nonbeneficiaries is invidiously discriminatory.").

And the court's repeated criticism that Indiana permits infertile couples to marry tacitly rejects this Court's reminders that classifications need not be drawn with absolute precision. *Vance v. Bradley*, 440 U.S. 93, 108 (1979) ("Even if the classification involved . . . is to some extent both underinclusive and overinclusive, and hence the line drawn by [the legislature] imperfect, it is nevertheless the rule that in a case like this perfection is by no means required.") (internal quotation marks omitted)).

Ultimately, the Seventh Circuit engaged in little more than its own redefinition of marriage accompanied by its own weighing of the regulatory costs and benefits of marriage. Far from adhering (as it had claimed, App. 5a) to this Court's maxim that, "equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices," *Beach*, 508 U.S. at 313, the court took exactly that course.

2. As a matter of equal protection doctrine, one fundamental problem with the Seventh Circuit's decision to balance costs and benefits is that it did so based on an unexamined, and entirely false, assumption, *i.e.*, that a traditional marriage

definition constitutes facial discrimination based on sexual orientation. *See, e.g.*, App. 12a (stating that Indiana is "discriminating against homosexuals by denying them a right that [the State] grant[s] to heterosexuals, namely the right to marry an unmarried adult of their choice"). Yet the court does not, and cannot, justify the assertion that Indiana's definition of marriage targets homosexuals. The statue itself makes no mention of sexual orientation, and as the case record in this case amply demonstrates, homosexuals often do marry members of the opposite sex in Indiana. Decl. of Bonnie Everly at 2, Decl. of Linda Judkins at 2, Decl. of Dawn Lynn Carver at 2, *Baskin v. Bogan*, No. 1:14-cv-355-RLY-TAB, Doc. Nos. 36-3, 36-4, 36-6 (S.D. Ind. Apr. 3, 2014).

No one doubts that traditional marriage laws *impact* heterosexuals and homosexuals differently, but that is not the same thing as creating *classifications* based on sexual orientation, particularly considering the benign history of traditional marriage laws generally. *See, e.g.*, *Washington v. Davis*, 426 U.S. 229, 242 (1976) (holding that disparate impact on a suspect class is insufficient to justify strict scrutiny absent evidence of discriminatory purpose). When a facially neutral statute is challenged on equal protection grounds, the plaintiff must show that "a state legislature[] selected or reaffirmed a particular course of action *at least in part because of, not merely in spite of*, its adverse effects [on] an identifiable group." *Pers.*

Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (emphasis added) (internal quotation marks omitted).

Marriage as an institution in this country has always been, until 10 years ago (Massachusetts), defined as a union of one man and one woman. It is utterly implausible to understand traditional marriage, at bottom, as an institution created for the purpose of discriminating against homosexuals. Yet that is exactly the assumption underlying the Seventh Circuit's analysis as it searches for a "social benefit" of not licensing or recognizing same-sex marriages. App. 36a. Notably, and in contrast to this Court's decisions in *Romer* and *Windsor*, the Seventh Circuit pointed to nothing in the history or adoption of Indiana's marriage law revealing any underlying animus against homosexuals.

Nor are homosexual couples "singled out" by Indiana's marriage laws. Heterosexual girlfriends who merely wish to pool resources, or even raise a child together, cannot obtain the benefits of marriage. A caregiver for a mentally competent but physically invalid friend of the same sex, whose care would benefit from marriage, cannot marry her friend. For that matter, heterosexual couples featuring close kin, minors, and mentally impaired individuals also face marital prohibitions. Ind. Code §§ 31-11-1-2, -4, -8-4. The inability of each of these heterosexual couples to marry under Indiana law

shows the traditional marriage definition does not target homosexuals akin to sodomy laws.

The Seventh Circuit's refusal to examine its assumption of discrimination is all the more startling given that the opinion's author has previously articulated the opposite view in published scholarship. Richard A. Posner, *Should There Be Homosexual Marriage? And If So, Who Should Decide?*, 95 Mich. L. Rev. 1578, 1582 (1997) ("There is no legal barrier to homosexuals' marrying persons of the opposite sex; in this respect there is already perfect formal equality between homosexuals and heterosexuals."). In any event, a coherent understanding of traditional marriage is impossible if one begins by assuming what has yet to be proven, *i.e.*, that it amounts to targeted discrimination.

With respect to its conclusion (contrary to circuit precedent, *see Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 953-54 (7th Cir. 2002)) that homosexuals are a protected class, the court pondered "genetic and neuroendocrine theories" concerning homosexuality, App. 13a-14a, but never addressed its regulatory relevance, as required by this Court's equal protection jurisprudence. *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 441-42 (1985) (cautioning that suspect class status is inappropriate where "individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement"). Same-sex couples cannot procreate,

but opposite-sex couples generally can, which provides the State's regulatory interests in marriage. This relevant distinction belies any claim that homosexuality constitutes a suspect class in this context.

Furthermore, while the Seventh Circuit concluded that homosexuals need special protection because "[n]o inference of manipulation of the democratic process by homosexuals can be drawn," App. 45a-46a, suspect classification is meant only for groups that "are politically powerless in the sense that they have no ability to attract the attention of the lawmakers," *Cleburne*, 473 U.S. at 445. This is not a fair characterization of a group that has achieved many recent legislative successes, that possesses the support of many prominent political, religious, and corporate entities, and that enjoys an upsurge in public support.

3. Even apart from the court's assumption that traditional marriage perforce equals discrimination against homosexuals, it felt free to rearticulate what it discerned to be the State's *real* interest in licensing and recognizing marriages. *See, e.g.*, App. 24a-25a.

The State, again, has maintained that marriage is a regulatory structure through which to ameliorate the consequences of unintended children. It is designed to attract potentially procreative couples and encourage them to stay together to care

for their biological children in tandem. The Seventh Circuit, however, "doubt[s]" whether the State "is serious in arguing that the only governmental interest in marriage derives from the problem of accidental births." App. 29a. As it considered the State's theory of marriage, it asked, critically, "[w]hy the qualifier 'biological'?" App. 26a.

States, of course, have *always* properly preferred biological parenting over adoptive parenting, and that has never been a controversial preference. *See Reno v. Flores*, 507 U.S. 292, 310 (1993) (explaining that "parents [are] whom our society and this Court's jurisprudence have always presumed to be the preferred and primary custodians of their minor children"). Yet the Seventh Circuit insists that the State has no greater interest in promoting parenting by a child's biological mother and father than in adoptive parenting. According to the Seventh Circuit, "[i]f the fact that a child's parents are married enhances the child's prospects for a happy and successful life, as Indiana believes not without reason, this should be true whether the child's parents are natural or adoptive." App. 26a.

According to the court, providing marriage as a way to deal with babies resulting from heterosexual intercourse "[o]verlook[s] . . . that many of those abandoned children are adopted by homosexual couples, and those children would be better off both emotionally and economically if their adoptive parents were married." App. 5a. Indeed, the court

said, Indiana has defined marriage in a way that "has ignored adoption—an extraordinary oversight." App. 25a.

In this regard, the court treated family regulation as if there could be no ordering of priorities, and gave no heed to how family regulation adapts to new challenges over time. In short, treating biological parenting and adoption as governmentally indistinguishable is anachronistic re-prioritization of legislative policy. The State's first order of business in this scheme, both historically and as a matter of regulatory priorities, is to encourage biological parents to care for their offspring together, thereby ameliorating burdens the rest of society might bear for raising their children. That first-order regulatory structure is marriage, which is at least as widely available as the permissible sexual relations that might produce children. Only *next* does the State concern itself with care of abandoned children and create adoptive and foster parenting systems. *See Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 1000 (Mass. 2003) (Cordy, J., dissenting) ("The eligibility of a child for adoption presupposes that at least one of the child's biological parents is unable or unwilling, for some reason, to participate in raising the child. In that sense, society has 'lost' the optimal setting in which to raise that child—it is simply not available."). That marriages provide excellent havens for raising adopted children does not mean that marriage was designed, or must be designed, with that outcome in mind.

The Seventh Circuit concludes that such an understanding of marriage's first order regulatory purposes is unsound, asserting that "encouraging marriage is less about forcing fathers to take responsibility for their unintended children—state law has mechanisms for determining paternity and requiring the father to contribute to the support of his children—than about enhancing child welfare by encouraging parents to commit to a stable relationship in which they will be raising the child together." App. 21a-22a.

Here, again, is another anachronism accompanied by judicial policymaking. Marriage inherently *precedes* "mechanisms" for determining paternity and imposing child support, since both follow from the birth of children within a traditional marriage. Such presumptions cease to make sense when applied to same-sex marriages, where alternative "mechanisms" for determining parental rights and obligations must *always* be used. These mechanisms do not supplant traditional marriage, but instead address circumstances where traditional marriage has failed to provide sufficient incentives for in-tandem biological parenting.

In short, the Seventh Circuit treated marriage as a regulatory *tabula rasa*, rejected the governmental interests justifying traditional marriage urged by the State, and, as a matter of constitutional law, redefined marriage as a regulatory mechanism for

all child-raising contexts. Such a novel understanding of the Fourteenth Amendment warrants this Court's consideration.

4. Finally, the decision below warrants review because it provides no limiting principle that could be applied to other groups' demands for unconventional marriage recognition and benefits.

Again, according to the Seventh Circuit's redefinition, the State cannot use marriage solely as a mechanism to encourage biological parents to raise their children in tandem, but must more generally use it to "enhanc[e] child welfare by encouraging parents to commit to a stable relationship in which they will be raising the child together." App 22a. As with other attempts to redefine marriage, this argument admits of no limiting principle as to the types of relationships that may assert marriage claims. And the Seventh Circuit's insistence that the State must prove some social utility for not affording marriage recognition to every such relationship nearly ensures constitutionalization of other non-traditional marriages, such as plural marriages.

By virtue of statutory amendment and judicial fiat, some States bestow parental rights and responsibilities even on entire groups of "co-parents." In recent years, Delaware and the District of Columbia have passed laws that recognize third "de facto" parents who have parental rights and

responsibilities. *See* D.C. Code §§ 16-831.01 *et seq.*; 13 Del. Code § 8-201(c). Courts in several other States have also recognized three parents. *See In re Parentage of L.B.*, 122 P.3d 161, 176-77 (Wash. 2005) (en banc) (recognizing third "de facto" parent); *C.E.W. v. D.E.W.*, 845 A.2d 1146, 1152 (Me. 2004) (same); *V.C. v. M.J.B.*, 748 A.2d 539, 555 (N.J. 2000) (recognizing third "psychological" parent); *LaChappelle v. Mitten*, 607 N.W.2d 151, 168 (Minn. Ct. App. 2000) (recognizing third-parent rights); *see also In re M.C.*, 123 Cal. Rptr. 3d 856, 861 (Cal. Ct. App. 2011).

Accordingly, if marriage rights must follow parental rights, as the decision below holds, there would be no basis for precluding marriage by *any* social grouping, regardless of the existence of a sexual relationship that can theoretically obtain parental rights. Sisters, brothers, platonic friends, groups of three or more—all would be on equal footing for purposes of the right to parent jointly and, thus, the right to marry. And again, under this model, it is only the *potential* for a group of adults to acquire parental rights—not the *actual* conferral of parental rights on any particular grouping—that would be the necessary predicate for marriage.

Indeed, the Seventh Circuit's insistence that marriage be used as a parental regulatory mechanism to support *any* family context cannot be squared with its fundamental premise that traditional marriage amounts to discrimination

based on sexual orientation. For while making babies implies sexual relations between parents, raising the children born of others does not. Redefining marriage to include same-sex couples does not amount to state endorsement of homosexual sex; rather, it represents the de-sexualization of marriage as a regulatory interest. An interest in responsible parenting generally is not the same as the interest that justifies marriage as a special regulation for *sexual* partners *as such*. Responsible *parenting* is not a theory supporting marriage for "homosexual couples," App. 20a—presumably meaning same-sex couples who have a sexual relationship—because it cannot answer two critical questions: Why two people? Why a sexual relationship?

Responsible parenting is instead a rationale for eliminating marriage as government recognition of a *limited* set of relationships. Once the natural limits that inhere in the sexual relationship between a man and a woman can no longer sustain the definition of marriage, the conclusion that follows is that any grouping of adults would have an equal claim to marriage.

Rather than address this point, however, the decision below merely returned to its criticism that Indiana (and every other State) permits infertile couples to marry, so channeling procreative sex cannot be its real purpose. App. 22a-24a. Having thus gutted marriage of any substantive meaning,

the decision below has left it to drift from one cultural transformation to the next, constantly to be repurposed by shifting social forces it was meant in some modest way to shape. *See Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 995 (Mass. 2003) (Cordy, J., dissenting) ("Paramount among its many important functions, the institution of marriage has systematically provided for the regulation of heterosexual behavior, brought order to the resulting procreation, and ensured a stable family structure in which children will be reared, education, and socialized.").

The Court should address this particularly misguided treatment of a venerable institution.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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