No. 14-278

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

RESPONDENTS' BRIEF IN SUPPORT OF CERTIORARI

STEVEN R. SHAPIRO
JAMES D. ESSEKS
American Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500

TIMOTHY S. BISHOP
HANS J. GERMANN
FRANK M. DICKERSON
Mayer Brown LLP
71 South Wacker Drive
Chicago, IL 60606
(312) 782-0600

JOHN A. KNIGHT
Counsel of Record
American Civil Liberties Union Foundation
180 North Michigan
Chicago, IL 60601
(312) 201-9740
jaknight@aclu.org

GRETCHEN HELFRICH
Loevy & Loevy
312 North May Street
Chicago, IL 60607
(312) 243-5900

Additional counsel listed on inside cover

REBECCA M. KLEIN
LINDA X. SHI
Mayer Brown LLP
71 South Wacker Drive
Chicago, IL 60606
(312) 782-0600

LAURENCE J. DUPUIS
American Civil Liberties Union of Wisconsin Foundation
207 E. Buffalo Street
Milwaukee, WI 53202
(414) 272-4032

Counsel for Respondents Virginia Wolf, et al.

QUESTIONS PRESENTED

1. Whether a state violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution when it treats same-sex and different-sex couples unequally with respect to marriage.

2. Whether a state violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution when it prohibits same-sex couples from marrying and refuses to recognize same-sex couples' lawful, out-of-state marriages.

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INTRODUCTION

The Seventh Circuit correctly held that Wisconsin's marriage ban is violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The court of appeals' ruling is consistent with more than two dozen rulings of other 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).

Despite the correctness of the Seventh Circuit's opinion, plaintiffs agree that this Court should grant certiorari in this case because the issues it presents are of fundamental importance to plaintiffs 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 plaintiffs is not likely to come until this Court decides these constitutional issues. This case provides an ideal vehicle for resolving the constitutional questions presented by state bans on marriage of same-sex couples because the factual and legal background of this case squarely presents the relevant issues without raising procedural or jurisdictional concerns, because Wisconsin has consistently defended its laws in the lower courts and in this Court, because the opinion in this case is the only court of appeals opinion to rely exclusively on the Equal Protection Clause to conclude that state marriage bans are unconstitutional, and because this case presents the opportunity for the Court to clarify that lesser forms of relationship protection for same-sex couples, such as Wisconsin's domestic partnership registry, do not resolve the equal protection problems. .

STATEMENT

A. The Plaintiffs-Respondents

Plaintiffs are eight same-sex couples who wish to marry or have their marriages recognized by the State of Wisconsin. All are in loving, committed relationships. Five plaintiff couples have been unable to marry the partner of their choosing in Wisconsin solely because that person is of the same sex. Three plaintiff couples have already been lawfully married under the laws of other jurisdictions, yet Wisconsin refuses to recognize their marriages. One of those couples lived for four years as a married couple in California, where their marriage was recognized and respected. They then had that recognition and respect stripped away when they moved to Wisconsin to accept a new job.

Plaintiffs wish to marry for a wide variety of reasons. They are all routinely denied the full range of state and federal benefits to which married different-sex couples are entitled. They are denied legal protection for their parental relationships with their children, the right to make health care decisions on their partner's behalf, and access to family medical leave. And every day the couples and their families suffer the indignity of having the State of Wisconsin declare that their loving relationships are less than equal.

B. Wisconsin's Marriage Ban

In 2006 Wisconsin voters amended its constitution to ban the licensing and recognition of marriages of same-sex couples. Article XIII, § 13 of the Wisconsin Constitution provides: "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." Wis. Cons. art. XIII, § 13.

This case arises from a facial federal constitutional challenge to Article XIII, § 13, along with any other Wisconsin law preventing the celebration or recognition of marriage by same-sex couples ("the marriage ban"), brought by plaintiffs in *Wolf* v. *Walker*.

C. Procedural History

1. The District Court Decision

Plaintiffs challenged Wisconsin's marriage ban as a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. On June 6, 2014, the district court granted summary judgment for plaintiffs on both due process and equal protection grounds in a thorough opinion. See *Wolf* v. *Walker*, 986 F. Supp. 2d 982 (W.D. Wis. 2014).

The district court first found that the Wisconsin marriage ban violated plaintiffs' due process rights. Pet. App. 73a-93a. It concluded that the right to marry is a clearly established fundamental right that includes same-sex couples and that Wisconsin's marriage laws significantly interfere with that right. *Ibid.* The district court concluded that the "common thread" connecting the Supreme Court's marriage and family rights decisions is that "they all relate to decisions that are central to the individual's sense of identity and ability to control his or her own destiny." *Id.* at 78a. The court also rejected the State's argument that the plaintiffs' right to marry was not sufficiently "deeply rooted" in the Nation's history to qualify for due process protection, finding that

"[p]ast practices cannot control the scope of a constitutional right." *Id.* at 86a. Finally, the district court rejected the State's attempts to distinguish *Loving* v. *Virginia*, 388 U.S 1 (1967), on the grounds that sex, unlike race, goes to the core of what marriage means. Pet. App. 86a-90a. Having concluded that the right to marry includes same-sex couples, the district court then found that Wisconsin's marriage ban clearly constituted "significant interference" with that right, including the right of the already-married couples to have their marriages recognized. *Id.* at 90a-93a.

The district court additionally found that Wisconsin's marriage ban unconstitutionally discriminates on the basis of sexual orientation, violating plaintiffs' equal protection rights. Pet. App. 93a-138a.[1] The district court concluded that sexual orientation is a suspect classification and thus subject to heightened scrutiny. *Id.* at 99a-111a. Applying the intermediate scrutiny standard,[2] the district court rejected all of the State's asserted interests, including tradition, responsible procreation, "optimal child rearing," "protecting the institution of marriage," "proceeding with caution," and the "slippery slope." *Id.* at 115a-138a.

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[1] The district court also considered the argument that the marriage ban unconstitutionally discriminates on the basis of sex, but declined to "wade into the jurisprudential thicket" on that topic "[b]ecause of the uncertainty in the law and because [it was] deciding the case in plaintiffs' favor on other grounds." Pet. App. 99a.

[2] The district court assumed that intermediate scrutiny applied because the difference between intermediate and strict scrutiny would not be dispositive in the case. Pet. App. 111a-115a.

The district court also dismissed a variety of other arguments from the State. It rejected the State's argument that a distinction between "positive rights" and "negative rights" protected the marriage ban. Pet. App. 59a-64a. The State labeled marriage as a "positive right" and argued that the Constitution protects the rights of individuals to be free from government interference (*i.e.*, "negative rights"), but that it does not give individuals a right to receive government benefits (*i.e.*, "positive rights"). The court rejected this theory, finding that "the Supreme Court has held on numerous occasions that marriage is a fundamental right protected by the Constitution" and that Wisconsin had clearly not abolished the institution of marriage; rather it had "limited the class of persons who are entitled to marry." *Id.* at 60a. The court concluded that "[e]ven in cases in which an individual does not have a substantive right to a particular benefit or privilege, once the state extends that benefit to some of its citizens, it is not free to deny the benefit to other citizens for any or no reason on the ground that a 'positive right' is at issue." *Id.* at 60a-61a.

The district court also rejected the State's federalism-based argument that the marriage ban is defensible because regulation of marriage is a matter traditionally left to the states. The State argued that the "federal courts should not question a state's democratic determination regarding whether and when to extend marriage to same-sex couples" and should rather "allow states to serve as 'laboratories of democracy.'" Pet. App. 64a-65a. The court acknowledged "the important role that federalism plays in this country," but held that "a general interest in federalism [does not] trum[p] the due process and equal protection clauses. States may not 'experiment'

with different social policies by violating constitutional rights." *Id.* at 66a.

2. The Seventh Circuit Decision

On September 4, 2014, the Seventh Circuit unanimously affirmed the decision of the district court.[3] *Baskin* v. *Bogan*, 2014 WL 4359059 (7th Cir. Sept. 4, 2014). The Seventh Circuit concluded that Wisconsin's marriage ban violates the Equal Protection Clause and therefore concluded that it need not reach the due process challenge. It found that neither State had provided any "reason to think that they have a 'reasonable basis' for forbidding same-sex marriage" and that more than a "reasonable basis" was required because the challenged discrimination is "along suspect lines." Pet. App. 4a (internal quotation marks omitted).

The Seventh Circuit found that "[d]iscrimination by a state or the federal government 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, makes the discriminatory law or policy constitutionally suspect." Pet. App. 4a. It held that these circumstances create a presumption that the law violates the Equal Protection Clause, rebuttable only by "a compelling showing that the benefits of the discrimination to society as a whole clearly outweigh the harms to its victims." *Id.* at 4a-5a. The court focused its analysis on four fac-

[3] On appeal, this case was consolidated solely for argument and disposition with *Baskin* v. *Bogan* (Nos. 14-2386 to 14-2388), and the Seventh Circuit also struck down the Indiana marriage ban.

tors: 1) whether the challenged classification targeted a group of persons who had experienced a history of discrimination; 2) whether the unequal treatment was based on an "immutable or at least tenacious characteristic" unrelated to a person's ability to participate in society; 3) whether the discrimination confers an important benefit on society as a whole that offsets the harm imposed; and 4) whether the discriminatory policy is overinclusive because it 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 apply equally to other groups as well. *Id*. at 5a-7a.

The Seventh Circuit analyzed and rejected multiple purported justifications for the laws propounded by Indiana and Wisconsin. It thoroughly rejected the argument advanced by both States that the marriage bans "enhance child welfare" and that the state has no interest in protecting marriage for same-sex couples "because homosexual sex cannot result in unintended births." Pet. App. 16a-28a. The Seventh Circuit reasoned that this argument fails because it ignores the children of same-sex couples, who "would be better off both emotionally and economically if their adoptive parents were married." *Id*. at 3a.

It then analyzed and rejected each of the four other arguments advanced by Wisconsin. It first rejected the argument that "limiting marriage to heterosexuals is traditional and tradition is a valid basis for limiting legal rights." Pet. App. 30a. The court stated that the argument "runs head on into *Loving* v. *Virginia*" and that "[i]f no social benefit is conferred by a tradition and it is written into law and it discriminates against a number of people and does

them harm beyond just offending them, it is not just a harmless anachronism; it is a violation of the equal protection clause." *Id*. at 31a-33a.

The court next rejected Wisconsin's argument that "the consequences of allowing same-sex marriage cannot be foreseen and therefore a state should be permitted to move cautiously." Pet. App. 30a. The court found that there was no evidence to support the contention that allowing same-sex couples to marry "will or may 'transform' marriage," nor that heterosexuals are "harmed" when same-sex couples marry. *Id*. at 34a-39a.[4] It also rejected Wisconsin's argument that its domestic partnership laws somehow ameliorated the unconstitutionality of its marriage ban because the Wisconsin domestic partnership status is inherently unequal to being married. *Id*. at 39a-41a.

The court also rejected Wisconsin's argument that "the decision whether to permit or forbid same-sex marriage should be left to the democratic process, that is, to the legislature and the electorate." Pet. App. 30a. Though it is true that the marriage ban was enacted through democratic processes, the court found that "[m]inorities trampled on by the democratic process have recourse to the courts; the recourse is called constitutional law." *Id*. at 41a. The court noted that neither state provided any support for the contention that lesbians and gay men are "politically powerful out of proportion to their numbers." *Id*. at 41a (internal quotation marks omitted).

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[4] The Seventh Circuit also rejected Wisconsin's argument that "same-sex marriage is analogous in its effects to no-fault divorce." Pet. App. 30a.

The court found that "[t]he states' concern with the problem of unwanted children is valid and important, 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. The states' solution is thus, in the familiar terminology of constitutional discrimination law, 'overinclusive.' It is also underinclusive, in allowing infertile heterosexual couples to marry, but not same-sex couples." Pet. App. 43a.

Finally, and for "completeness," the Seventh Circuit noted the "convergence of our four-step analysis with the more familiar, but also more complex, approach [to equal protection analysis] found in many cases," Pet. App. 42a, noting that the difference between the two approaches "is semantic rather than substantive." *Id.* at 7a. The Seventh Circuit found that the marriage ban's "discrimination against same-sex couples is irrational, and therefore unconstitutional even if the discrimination is not subjected to heightened scrutiny." *Id.* at 9a.

ARGUMENT

Plaintiffs and all other committed same-sex couples in Wisconsin are harmed by the State's denial to them of the freedom to marry. Under the Wisconsin marriage laws, plaintiffs are denied all state and federal spousal protections and obligations. Wisconsin withholds from all plaintiffs access to the status of marriage and the state law protections and obligations that marriage brings. Wisconsin's marriage ban thus "demeans [same-sex] couple[s], whose moral and sexual choices the Constitution protects," and "humiliates [thousands] of children now being raised

by same-sex couples." *United States* v. *Windsor*, 133 S. Ct. 2675, 2683 (2013). This Court should grant certiorari and affirm the Seventh Circuit's judgment.

I. This Case Provides an Excellent Vehicle for Certiorari.

This case presents an excellent vehicle for review by this Court. Wisconsin's marriage laws are exceptionally severe, combining a constitutional ban on marriage and statuses substantially similar to marriage for same-sex couples and a domestic partnership law. This case also encompasses plaintiffs who seek to marry and plaintiffs who seek recognition of their out-of-state marriages. Moreover, the State of Wisconsin, through its Department of Justice, has vigorously defended this action in all stages of the litigation, and continues to defend it in front of this Court. In addition, this case is an excellent vehicle for certiorari because the Seventh Circuit's opinion, more fully than any other appellate court, sets forth the reasons why the Equal Protection Clause requires striking down a marriage ban. Finally, this case is an ideal vehicle for certiorari because the parties have presented the full range of arguments for and against the constitutionality of state marriage bans.

In addition, granting *certiorari* would provide the Court with briefing and oral argument reflecting the experience of counsel for the plaintiffs, who 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), and *Windsor*.

A. The Factual and Legal Context of This Case Warrants Granting the Petition.

Among the states seeking certiorari review of the constitutionality of their marriage laws, Wisconsin alone provides domestic partnerships for same-sex couples. Two other states, Colorado and Nevada, also provide domestic partnership or civil union systems for same-sex couples. Colo. Rev. Stat. § 14-15-101, *et seq*. (civil unions); Nev. Rev. Stat. § 122A.010, *et seq*. (domestic partnerships). Those systems provide some protections for couples who register, but a different, and lesser, status for their relationships. Granting review in this case will provide the Court an opportunity to clarify that such lesser relationship statuses are inconsistent with the Constitution. Granting review in this case, potentially in addition to other cases, will provide the greatest guidance for state legislatures, for lower courts, and for same-sex couples going forward.

But even plaintiffs with domestic partnerships are denied the full benefit of state and federal protections and obligations that come with marriage. Article XIII, § 13 of the Wisconsin Constitution states that "[o]nly a marriage between one man and one woman shall be valid or recognized as a marriage in this state," and that "[a] legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state." Plaintiffs with domestic partnerships, for example, are excluded from the spousal obligation of mutual responsibility and support, and they are denied the protections that come from the treatment of their property as marital property. See Wis. Stat. §§ 765.001(1), 766.15, 766.55(2), 766.31(2), 860.01(1).

The unmarried plaintiffs are also denied all federal spousal protections and obligations, and the married plaintiffs are denied those federal spousal protections and obligations that are reserved to couples whose marriages are recognized in their state of residence. See *Windsor*, 133 S. Ct. at 2683 (more than "1,000 federal laws in which marital or spousal status is addressed as a matter of federal law"); with respect to benefits tied to state of residence, see also 29 C.F.R. § 825.122(b) (ability to take time off of work to care for a sick spouse under the Family & Medical Leave Act); 42 U.S.C. § 416(h)(1)(A)(i) (access to a spouse's social security benefits); U.S. Social Security Administration Program Operations Manual System, GN 00210.100 ("Windsor Same-Sex Marriage Claims"), GN 00210.400 ("Same-Sex Marriage—Benefits for Surviving Spouses"), at http://tinyurl. com/m4b4q8v.

In addition to the denial of state and federal spousal protections, the Wisconsin marriage laws contain additional provisions that harm the plaintiffs. Article XIII, § 13 of the Constitution of Wisconsin bars the recognition of any legal status substantially similar to marriage for same-sex couples. plaintiffs Virginia Wolf and Carol Schumacher, as well as plaintiffs Kami Young and Karina Willes, were legally married in Minnesota but cannot have their marriages recognized in Wisconsin. Pet. App. 52a. Similarly, plaintiffs Johannes Wallmann and Keith Borden were married in Canada in 2007, lived as a married couple for four years in California, but cannot have their marriage recognized in Wisconsin. *Ibid.*

And under Wisconsin's marriage laws, plaintiffs are prevented from securing legal recognition of their

parental rights. For example, plaintiffs Kami Young and Karina Willes are unable to secure recognition of Willes' parental rights with regard to their daughter, to whom Kami gave birth last April. If Kami and Karina's Minnesota marriage were recognized in Wisconsin, Karina would automatically be deemed the baby's parent pursuant to Wisconsin law's presumption of parenthood for children born to married couples. See Wis. Stat. §§ 891.40(1), 891.41(1). Without marriage, Wisconsin law prevents Karina from even obtaining a stepparent or second-parent adoption (as other states provide). Plaintiffs Bill Hurtubise and Dean Palmer are likewise prohibited from jointly adopting their three children because they are unmarried. Wis. Stat. § 48.82(1)(a).

B. The State Has Consistently and Vigorously Defended Its Marriage Laws.

High-ranking Wisconsin state officials—Governor Scott Walker, J.B. Van Hollen, the Attorney General, and Oskar Anderson, the State Registrar of Vital Statistics—continue to vigorously defend Wisconsin's marriage ban. The Attorney General represented Governor Walker, State Registrar Anderson, and other State officials in the district court proceedings (including briefing the State Defendants' motion to dismiss and the State Defendants' motion for summary judgment) and represented Petitioners in their appeal of the district court's decision to the Seventh Circuit. The Attorney General continues to represent Governor Walker and State Registrar Anderson in the instant petition for a writ of certiorari.

C. The Seventh Circuit's Opinion Most Fully Develops the Reasons Why the Equal Protection Clause Bars State Marriage Bans.

This petition provides a particularly strong vehicle because the Seventh Circuit's decision so fully develops why the Equal Protection Clause prohibits marriage bans. Other opinions addressing the issue that have touched on the Equal Protection Clause have done so after concluding that bans on marriage of same-sex couples violate the fundamental right to marry as protected by the Due Process Clause. As a consequence, other opinions, to the extent that they have addressed equal protection issues, have applied this Court's precedents requiring strict scrutiny for classifications that abridge a fundamental right.

The Seventh Circuit, by contrast, analyzes the appropriate standard of review for an Equal Protection challenge to a sexual orientation classification. The opinion provides an excellent vehicle for this Court to address the appropriate level of review for sexual orientation classifications.

D. This Case Presents the Full Range of Legal Issues and Arguments Regarding Marriage of Same-Sex couples.

The parties in this case briefed and argued the full range of legal issues regarding marriage of same-sex couples. In their briefs before the Seventh Circuit, the parties addressed claims based in both the Due Process and Equal Protection Clauses.

With respect to the claim that the marriage ban burdened the fundamental right of marriage for same-sex couples, the State Defendants argued both that the fundamental right of marriage does not ap-

ply to same-sex couples, and that, even if the fundamental right of marriage applies to same-sex couples, it merely confers negative rights, and not positive benefits. The positive and negative rights analysis is thus far unique to the Wisconsin State Defendants.

With respect to the claim that the marriage ban violates the Equal Protection Clause, the State Defendants argued that rational basis review should apply, and advanced a wide range of purportedly rational bases, including tradition, proceeding cautiously and maintaining the status quo, protecting the democratic process, and promoting responsible procreation by different-sex couples.

Finally, the parties addressed the question of recognition of out-of-state marriages, and whether the State's denial of such recognition is an independent harm.

II. Although Certiorari Is Warranted, the Seventh Circuit's Judgment Should Be Affirmed

The Seventh Circuit's opinion provides an excellent foundation for review by this Court, given the exceptional importance of the issues addressed and the quality of the case as a vehicle for certiorari. Although review of this case is warranted for the reasons discussed above, the Seventh Circuit's judgment should be affirmed.

A. The Seventh Circuit Correctly Concluded That Heightened Scrutiny Applies to Classifications Based On Sexual Orientation.

The Seventh Circuit concluded heightened scrutiny applies to classifications based on sexual orien-

tation through applying principles that "go to the heart of equal protection doctrine." Pet. App. 7a. The Seventh Circuit concluded that the marriage ban was a classification based on sexual orientation that targeted "homosexuals [who] are among the most stigmatized, misunderstood, and discriminated-against minorities in the history of the world." *Id*. at 12a. The court further recognized that "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," and noted that "neither Indiana nor Wisconsin argues otherwise." *Id*. at 10a.

Petitioners claim that the Seventh Circuit's approach is unprecedented because it "presume[s] that a state is engaged in baseless discrimination when it favors traditional marriage." Pet. 16. In fact, the Seventh Circuit's approach to determining whether a classification is entitled to heightened scrutiny is consistent with this Court's precedents. See generally *Bowen* v. *Gilliard*, 483 U.S. 587, 602-03 (1987).

Once heightened scrutiny is applied, this Court's precedents require the State to make "a compelling showing that the benefits of the discrimination to society as a whole clearly outweigh the harms to its victims." Pet. App. 4a-5a, citing *Grutter* v. *Bollinger*, 539 U.S. 306, 326–27 (2003) and *United States* v. *Virginia*, 518 U.S. 515, 531–33 (1996). The Seventh Circuit addressed this Court's requirement that classifications subject to heightened scrutiny "serv[e] important governmental objectives and that the discriminatory means employed" be "substantially related to the achievement of those objectives" (*Virginia*, 518 U.S. at 524) by addressing whether the discriminatory policy conferred any offsetting

benefit and, if so, whether the policy was "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." Pet. App. 6a.

Petitioners contend that this approach does not "fairly determine whether a state's law is sufficiently 'tailored' to meet a state's proffered interests." Pet. 17. That can't be right. A law that conveys a benefit on society but is drawn so as to be overinclusive, thus inflicting unnecessary harm on a protected class, is by definition not "tailored to meet a state's proffered interest." Likewise, a law that excludes a disfavored class from protection is not sufficiently tailored when the disfavored class's exclusion does not advance the asserted policy objectives.

B. The Seventh Circuit Correctly Concluded That Wisconsin's Marriage Ban Failed to Satisfy Heightened Scrutiny, or, in the Alternative, Failed to Satisfy Rational Basis Review.

The Seventh Circuit correctly concluded that Wisconsin's marriage ban failed both heightened scrutiny and rational basis review, holding that "the grounds advanced by Indiana and Wisconsin for their discriminatory policies are not only conjectural; they are totally implausible." Pet. App. 42a. The Seventh Circuit did not find, and Wisconsin failed to identify, any reason why excluding same-sex couples from marriage furthered the State's interest in enhancing child welfare through regulating procreation. *Id*. at 16a-22a. Petitioner's argument from tradition was properly rejected because tradition alone

cannot provide a rational basis for discrimination. *Id.* at 31a-34a. The Seventh Circuit likewise properly rejected Petitioner's argument that the State had an interest in "proceeding with caution" with regard to permitting same-sex couples to marry, as the State offered no reasoning identifying any negative consequences to permitting such marriages. *Id.* at 34a-37a. Finally, the Seventh Circuit properly rejected the State's contention that the marriage ban was justified because it was the result of a democratic process, concluding that "[m]inorities trampled on by the democratic process have recourse to the courts; the recourse is called constitutional law." *Id.* at 41a.

CONCLUSION

The State's petition for a writ of certiorari should be granted and the judgment of the court of appeals should be affirmed.

Respectfully submitted.

STEVEN R. SHAPIRO
JAMES D. ESSEKS
American Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500

JOHN A. KNIGHT
Counsel of Record
American Civil Liberties Union Foundation
180 North Michigan
Chicago, IL 60601
(312) 201-9740
jaknight@aclu.org

TIMOTHY S. BISHOP
HANS J. GERMANN
FRANK M. DICKERSON
REBECCA M. KLEIN
LINDA X. SHI
Mayer Brown LLP
71 South Wacker Drive
Chicago, IL 60606
(312) 782-0600

LAURENCE J. DUPUIS
American Civil Liberties Union of Wisconsin Foundation
207 E. Buffalo Street
Milwaukee, WI 53202
(414) 272-4032

GRETCHEN HELFRICH
Loevy & Loevy
312 North May Street
Chicago, IL 60607
(312) 243-5900

Counsel for Respondents

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