No. _____

In the Supreme Court of the United States

A.M.B. AND T.G.,

Petitioners,

V.

CIRCUIT COURT FOR ASHLAND COUNTY,
THE HONORABLE KELLY J. MCKNIGHT, PRESIDING,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioners A.M.B. and T.G. have been in a committed relationship for over a decade. Together, they have raised M.M.C, A.M.B.'s biological daughter, as their child. M.M.C.'s biological father was never a serious part of M.M.C.'s life, and his parental rights have been terminated. Everyone—including the State of Wisconsin—acknowledges that it would be in the best interests of M.M.C. for T.G. to adopt her, giving her the legal father she currently lacks. Yet, the Wisconsin Supreme Court disapproved that adoption on the basis of a Wisconsin law that categorically disqualifies unmarried people from adopting the children of their partners, even though Wisconsin law allows such second-parent adoption by married people, and even though Wisconsin law normally equates married and unmarried people for the purposes of adoption. The question presented is:

Whether a State's categorical disqualification of unmarried people from adopting the children of their partners violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

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PARTIES TO THE PROCEEDINGS BELOW

Petitioners A.M.B. and T.G. were petitioners-appellants in the Supreme Court of Wisconsin.

Respondent Circuit Court for Ashland County, the Honorable Kelly J. McKnight, presiding, was respondent in the Supreme Court of Wisconsin.

RELATED PROCEEDINGS

In the Interest of M.M.C., No. 22AD02, Circuit Court for Ashland County, Wisconsin, order on petition for adoption entered on July 11, 2022.

In the Matter of the Adoption of M.M.C.: A.M.B. & T.G. v. Circuit Court for Ashland County, the Honorable Kelly J. McKnight, presiding, No. 2022AP1334, State of Wisconsin Court of Appeals District III, petition to bypass court of appeals granted on February 21, 2023.

In the Matter of the Adoption of M.M.C.: A.M.B. & T.G. v. Circuit Court for Ashland County, the Honorable Kelly J. McKnight, presiding, No. 2022AP1334, Supreme Court of Wisconsin, judgment entered on April 30, 2024.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners A.M.B. and T.G. respectfully petition this Court for a writ of certiorari to review the judgment of the Supreme Court of Wisconsin in this case.

OPINIONS BELOW

The opinion of the Wisconsin Supreme Court (App. 1a-46a) is reported at 5 N.W.3d 238. The district court's oral ruling (App. 54a-62a) and order denying the petition for adoption (App. 63a-65a) are unreported.

JURISDICTION

The Wisconsin Supreme Court entered a final judgment in this case on April 30, 2024 (App. 1a-46a). On July 25, 2024, Justice Barrett extended the time to file the petition for a writ of certiorari until September 27, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are set forth in the appendix to this petition. App. 47a-53a.

INTRODUCTION

This case presents a fundamental question concerning the Fourteenth Amendment's guarantee of equal protection when it comes to laws in nearly half the States standing between the individual and one of the most important aspects of life—family.

Petitioners A.M.B. and T.G. are a committed couple who have lived together and raised A.M.B.'s biological daughter, M.M.C., for more than a decade. M.M.C.'s biological father was never a serious part of her life, and his parental rights have been terminated. T.G. seeks to adopt M.M.C., giving her the legal father she currently lacks and legally cementing petitioners' family with M.M.C. After conducting a comprehensive home study, the State of Wisconsin not surprisingly found that it was in the best interests of M.M.C. to be adopted by T.G. Yet, the Wisconsin courts denied T.G.'s adoption petition because—and only because—A.M.B. and T.G. have chosen not to marry for deeply personal reasons that have nothing to do with their commitment to one another. As the courts explained, Wisconsin law classifies married and unmarried people differently for the purposes of adoption, permitting married people to adopt their partners' children, while categorically barring unmarried people from doing so.

Applying an exceedingly lax form of rational basis review, the Wisconsin Supreme Court upheld the State's categorical ban against adoption by unmarried people under the Equal Protection Clause of the United States Constitution and so barred M.M.C.'s adoption. App. 1a-2a. The court reasoned that it was reasonable for the State to enact a categorical ban against adoption by unmarried partners because "[a]

child joining a family with married parents enjoys a greater likelihood of a financially stable upbringing compared to a household with two unmarried parents." *Id.* at 19a. As one justice acknowledged, however, "the logical threads" of the court's reasoning "begin to shred under the weight of any sincere scrutiny." *Id.* at 41a (Karofsky, J., concurring).

This case urgently warrants this Court's review. The decision below presents the extraordinarily important constitutional question of whether, or when, the Equal Protection Clause permits a State to categorically disqualify a class of otherwise fit, potential adoptive parents on the sole basis of their choice not to get married. Approximately half the States have laws similar to Wisconsin's, categorically disqualifying otherwise fit adults from adopting the biological children of their partners and becoming second legal parents to those children. No adult, or child, should be denied the blessings and legal benefits of a parent-child relationship based solely on a decision not to marry. Yet, despite the crucial need for fit individuals willing to adopt, States like Wisconsin have enacted unconstitutional bans like the one at issue here, irrationally blocking adoptions even when they are in the best interests of the child. Given the extraordinarily important interests at stake, this Court's intervention is warranted.

The Wisconsin Supreme Court's decision is also indefensible on the merits. Wisconsin's categorical ban bears at least two hallmarks of *irrationality* recognized by this Court. First, instead of advancing the asserted state interest of providing adopted children with a more stable home, the ban actually undermines that interest by preventing adoptions that are concededly in the best interests of the child.

Second, Wisconsin's statutory scheme is self-contradictory. Wisconsin generally permits "an unmarried adult" to adopt children, and does not even give any automatic preference to a married adult over an unmarried one. Wis. Stat. § 48.82(1)(b).

The exceedingly lax review applied by the Wisconsin Supreme Court is particularly egregious considering that the legislative classifications at issue inhibit a host of personal relationships, discriminate against non-traditional family structures, and penalize children for choices made by adults, over which the children have no control. Those are all areas in which this Court has never hesitated to apply more probing scrutiny. However lenient rational basis review may be, it must still be meaningful. Indeed, that review is a fail-safe against countless classifications, including those—like the one at issue here—that affect the most important and fundamental relationships and personal interests.

The Court should grant review to decide the exceptionally important question presented. Granting review would also provide this Court with a clean, much-needed opportunity to clarify the minimum requirements for rational basis review, an issue that Justices of this Court have recognized warrants further guidance and that has vexed lower courts and confounded scholars. Guidance is needed to ensure that rational basis review remains meaningful, not a rubber-stamp of legislative classifications no matter how unreasonable and unsupported they are.

The petition should be granted.

STATEMENT OF THE CASE

A. Legal Background

In Wisconsin (as in other States), adoption is a "creature of statute," which "confers legal rights and duties on adopted children and their adoptive parents." App. 1a. Most fundamentally, adoption creates a legal parent-child relationship between the adoptive parent and the adopted child. Thus, after an "order of adoption is entered," "the relation of parent and child and all the rights, duties and other legal consequences of the natural relation of child and parent thereafter exists between the adopted person and the adoptive parents." Wis. Stat. § 48.92(1).

The "paramount consideration" of Wisconsin's adoption statute (and of all its laws pertaining to the treatment of children more generally) is—and has always been—the "best interests of the child." *Id.* § 48.01(1). Accordingly, Wisconsin law directs courts to grant a petition for adoption only after determining that the adoption "is in the best interests of the child." *Id.* § 48.91(3). In making that determination, the court is aided by "an investigation," conducted by a government agency, aimed at ascertaining "whether the petitioner's home is suitable for the child," including "whether the petitioner is fit and qualified to care for the child" and "displays the capacity to successfully nurture the child." *Id.* § 48.88(2)(a), (aj)(1).

Despite the singular focus of adoption law on the best interests of the child, Wisconsin has enacted laws categorically disqualifying one class of individuals from adopting, based solely on their choice to exercise their right not to marry. The result is a strange discrepancy. In Wisconsin, an unmarried adult *may*

adopt a child. *Id.* § 48.82(1)(b). And if a child lives with one of his or her biological parents and the other parent is deceased (or the other parent's parental rights have been terminated), then "the spouse of the child's parent" may adopt the child and become a second legal parent for the child (provided a court is satisfied that this is in the child's best interests). *Id.* §§ 48.81, 48.82. But the unmarried partner of the child's parent is categorically disqualified from adopting the child and becoming her second legal parent—even when, as the lower courts found here, such adoption would be in the best interests of the child. *See id.* § 48.82; App. 5a, 20a; *see* Wis. Stat.§ 48.92(2) (adoption results in cessation of legal relationship with birth parent "unless the birth parent is the spouse of the adoptive parent").

B. Factual Background

1. The relevant facts of this case are undisputed. M.M.C., who is now fifteen years old, has always lived with her biological mother, A.M.B. She was abandoned by her biological father and has long had no "meaningful relationship" with him. App. 4a. His parental rights have been terminated. *Id.*

A.M.B.'s male partner, T.G., has filled the void left by M.M.C.'s absent biological father. For over a decade, T.G. and A.M.B. have lived together in a committed, non-marital relationship, raising M.M.C. as their child and as part of a family. *Id.* They have chosen not to formally marry for deeply held personal reasons related in part to their own histories growing up in families with broken marriages.

T.G. has "assumed a variety of parental duties" as to M.M.C., *id.* at 4a, and has "demonstrated dedication and commitment" to her, *id.* at 42a

(Karofsky, J., concurring). T.G. and M.M.C. have strong emotional and psychological bonds. Because T.G. has raised M.M.C. as his daughter with selfless dedication, she "views T.G. as her father." *Id.* at 4a-5a; *see id.* at 73a.[1]

2. In January 2022, A.M.B. and T.G. sought legal recognition of "T.G.'s fatherly bond and relationship with M.M.C." by filing a petition to adopt M.M.C. *Id.* at 4a. In response, the Ashland County Department of Human Services (DHS) conducted a Multipurpose Home Study Report "to determine whether [M.M.C.] [wa]s a proper subject for adoption and whether [A.M.B. and T.G.'s] home [wa]s suitable for [M.M.C.]." Wis. Stat. § 48.88(2)(a); App. 66a-94a. Such reports are required under Wisconsin law and "provide" a "comprehensive" "qualitative evaluation of a petitioner's personal characteristics, civil and criminal history, age, health, financial stability, and ability to responsibly meet all [additional] requirements." Wis. Stat. § 48.88(2)(aj)(2).

As part of its investigation, DHS conducted lengthy interviews with A.M.B., T.G., and M.M.C. During those interviews M.M.C. (who was then 13-years old) reported that she regards T.G. as her only father and wishes to be adopted by T.G. as his legal—and permanent—daughter. App. 75a.

After completing its investigation, DHS recommended that the adoption petition be approved. App. 93a; *see* Wis. Stat. § 48.89; App. 87a, 89a, 91a,

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[1] Additional facts concerning T.G.'s close relationship with M.M.C. and the loving and secure home that T.G. and A.M.B. have created for M.M.C. are set forth in the Home Study Report conducted by the State. *See* App. 66a-94a.

93a (discussing DHS's findings as to the loving home A.M.B. and T.G. have provided for M.M.C.).

C. Proceedings Below

1. On June 22, 2022, the Circuit Court of Ashland County conducted a hearing on the petition to adopt M.M.C. App. 54a-62a; *see* Wis. Stat. § 48.91. The court noted that it had reviewed the home study and concluded that adoption of M.M.C. by T.G. was undoubtedly in M.M.C.'s best interests. App. 56a. Yet, the court was compelled to reject the petition because A.M.B. and T.G. have chosen not to marry. The court explained that while Wisconsin law permits second-parent adoption by the spouse of a child's parent, it categorically bans such adoption by the unmarried partner of a child's parent. *Id.* The court also explained that any contrary reading of Wisconsin's adoption statute is foreclosed by Wisconsin Supreme Court precedent. *Id.* (summarizing *Georgina G. v. Terry M. (In re Angel Lace M.)*, 516 N.W.2d 678, 682 (Wis. 1994)).

On July 11, 2022, the circuit court issued an order denying the petition to adopt M.M.C. App. 63a-65a. The order reiterated that T.G. is otherwise fit and that the adoption would be in the best interests of M.M.C. *Id.* at 64a. Yet, the court was compelled to deny the petition under Wisconsin law because T.G. is not married to A.M.B. *Id.* at 64a-65a.

2. T.G. and A.M.B. appealed to the Wisconsin Court of Appeals. But because the court of appeals was itself bound by *Angel Lace* (which also foreclosed their constitutional arguments), T.G. and A.M.B. then petitioned the Wisconsin Supreme Court for bypass of the Court of Appeals, which the state Supreme Court granted. *Id.* at 5a-6a.

As relevant here, petitioners argued that the denial of the petition to adopt M.M.C. violated T.G and M.M.C's federal equal protection rights. *Id.* at 5a.[2] More specifically, they argued that Wisconsin's adoption statute violates the Equal Protection Clause of the United States Constitution by (1) excluding the child of a parent in an unmarried relationship from the category of children "[w]ho may be adopted" while including the child of a parent in a married relationship in that category; and (2) excluding the unmarried partner of a child's parent from the category of adults "[w]ho may adopt" a child, while including the married partner of a child's parent in that category. Wis. Stat. §§ 48.81, 48.82.

3. On April 30, 2024, the Wisconsin Supreme Court rejected petitioners' equal protection challenge to Wisconsin's adoption statute and affirmed the circuit court's denial of the petition to adopt M.M.C. App. 1a-22a. The court first explained that "the legislative classifications restricting adoption" are subject only to "rational basis" review because they "do not infringe a fundamental right or affect a protected class." *Id.* at 22a. The court then held that the classifications survive that test "[b]ecause the state has a legitimate interest in promoting stability for adoptive children through marital families," so a "rational basis exists" for the classifications. *Id.*

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[2] Petitioners also argued that Wisconsin's classifications violate Article I, Section 1 of the Wisconsin Constitution, but the Wisconsin Supreme Court rested its decision exclusively on its interpretation of the federal Constitution, based on its "general principle" to treat "the United States and Wisconsin Constitutions as consistent with each other in their due process and equal protection guarantees." App. 7a n.6 (citation omitted).

Justice Karofsky filed a separate concurring opinion. *Id.* at 40a-46a. She explained that, in her view, the "connection between the statutes and their stated goal of promoting a child's best interest" is "specious" and rests on "nothing more than a fraying tangle of dubious assumptions[] [and] circular reasoning," and "the logical threads" of the classifications at issue "begin to shred under the weight of any sincere scrutiny" *Id.* at 41a. Yet, Justice Karofsky concurred in the result reached by the court, reasoning that rational basis review is an exceedingly "low bar" that is satisfied even by "threadbare" connections between a challenged classification and the purported state interest. *Id.* at 46a.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari for at least three reasons. First, the decision below implicates an extraordinarily important constitutional question that affects access to adoption by otherwise fit adults—and access by children to fit adults who wish to assume the obligations (and blessings) of parenting—in approximately half the States. Second, the decision below employs an indefensibly lax form of rational basis review to uphold a state classification riddled with self-contradictions and other problems. And, third, this case presents this Court with an ideal opportunity to provide needed guidance about the minimum requirements for rational basis review of legislative classifications, including those impinging on crucially important interests like family.

I. THE CONSTITUTIONALITY OF STATE LAWS CATEGORICALLY BANNING ADOPTION BY A CLASS OF OTHERWISE FIT ADULTS IS VITALLY IMPORTANT

The context in which this equal protection case arises—adoption—is instrumental to understanding this case's importance and the urgent need for this Court's review. For both potential adoptive parents and potential adopted children, the availability of adoption is literally life-changing. Adoptive parents assume the solemn legal and moral responsibility to care for children as their own. And adopted children benefit from being in the loving, stable, and supportive environment that adoptive parents can provide. Successful adoptions are thus virtually always—indeed, as a matter of law must be—in the best interests of the child. *Supra* at 5. Adoption is also critical to family, enriching the lives of parents, as well as children and other family members.

The importance of adoption extends beyond the creation of stable families for adopted children. Under the typical adoption statute, adoption "is recognized as the legal equivalent of biological parenthood," *Smith v. Organization of Foster Fams. for Equality & Reform*, 431 U.S. 816, 844 n.51 (1977); 2 Joan Haifetz Hollinger, *Adoption Law & Practice* § 12.01 (2024 online) (describing the "legal relationship created by an adoption" as "a complete substitution of adoptive parents for birth parents for all purposes").[3] This means that adopted children enjoy the same legal benefits and rights that biological children enjoy. For example, an adopted

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[3] *See, e.g.,* Wis. Stat. § 48.92; Del. Code Ann. tit. 13, § 919; Nev. Rev. Stat. § 127.160.

child has the same priority as a natural child with respect to intestate succession, and an adoptive parent is required to pay for the support and health care expenses of an adopted child just like a parent must pay such expenses for a natural child. *Adoption Law & Practice*, *supra*, §§ 12.02-12.07.[4] Likewise, under federal law, adopted children are entitled to the same social security benefits as biological children. 42 U.S.C. §§ 402(d), 416(e).

Second-parent adoption is no different. In addition to "provid[ing] additional economic security," *In re Adoption of Child ex rel. J.M.G.*, 632 A.2d 550, 551 (N.J. Super. Ct. Ch. Div. 1993), a legal relationship between the child and the second parent not only cements the family relationship but "enable[s] [the child] to preserve her unique filial ties" with the second parent in the event that her biological parent dies or her two parents separate—as happens in the case of married as well as unmarried relationships. *Adoption of Tammy*, 619 N.E.2d 315, 320 (Mass. 1993). This allows the child "to achieve a measure of permanency with both parent figures," *In re Jacob*, 660 N.E.2d 397, 399-400 (N.Y. 1995), and prevents the child from "remain[ing] in legal limbo" should any "issues of custody and visitation" arise. *Adoption of Tammy*, 619 N.E.2d at 320-21.

The value of the "emotional security" that adoption provides in such situations cannot be

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[4] With respect to intestate succession, *see, e.g.*, Wis. Stat. §§ 48.92(1), (3), 852.01, 854.20; Nev. Rev. Stat. § 127.160; Cal. Prob. Code § 6450(b); Tex. Est. Code Ann. § 201.054. With respect to the requirement of an adoptive parent to pay support, *see, e.g.,* Wis. Stat. §§ 48.92, 767.511; Cal. Fam. Code §§ 3900, 8616.

overestimated. *In re Jacob*, 660 N.E.2d at 399. Stability and permanence are likely the most important factors in a child's emotional and psychological flourishing. Vera I. Fahlberg, *A Child's Journey through Placement* 23-24 (1991). This is particularly true for the very young. *See, e.g.*, Virginia L. Colin, U.S. Dep't of Health & Human Servs., *Infant Attachment: What We Know Now* at ii (June 1991), https://aspe.hhs.gov/sites/default/files/private/pdf/73816/inatrpt.pdf ("[E]arly infant attachment … is at the heart of healthy child development ….").

The importance of adoption is not only qualitative. Approximately 100,000 children are adopted each year in the United States.[5] Many others await adoption in foster care or other alternative child-care arrangements.[6] Some find themselves in homes, but without the security that comes with adoption. Accordingly, the need for States to maintain steady pools of willing and fit adoptive parents is acute.

As noted above, *supra* at 5-6, although Wisconsin allows unmarried *single* people to adopt, Wis. Stat. § 48.82(1)(b), it categorically bans unmarried people from adopting the children of their partners. Approximately half of the States have similar laws categorically preventing second-parent adoptions by unmarried partners, despite the fact that "the goal of

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[5] Eun Koh et al., National Council for Adoption, *Adoption by the Numbers* 5 (2022), https://adoptioncouncil.org/wp-content/uploads/2022/12/Adoption-by-the-Numbers-National-Council-For-Adoption-Dec-2022.pdf.

[6] Nicole Devi, National Council for Adoption, *Foster Care and Adoption Statistics – AFCARS Annual Update* (Mar. 20, 2024), https://adoptioncouncil.org/article/foster-care-and-adoption-statistics/.

adoption statutes is to protect the best interests of children." *In re Adoption of Zschach*, 665 N.E.2d 1070, 1073 (Ohio), *cert. denied*, 519 U.S. 1028 (1996). Those States permit a married person to adopt the child of his or her spouse and become the second legal parent of that child, but categorically disqualify an unmarried person from doing the same with the child of his or her partner, without regard for whether such adoption is in the best interests of the child. [7]

Such categorical disqualifications shrink the pool of otherwise fit and loving adults who can adopt in large swaths of the country—penalizing not just potential adoptive parents, but the children who could be adopted too. What is more, as this case well illustrates, such laws bar adoption even when it is clearly in the child's best interests—as the State itself determined here. App. 56a. This causes immeasurable hardship to otherwise fit adults who wish to adopt and to the children themselves, who are

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[7] *See, e.g.,* Ala. Code § 26-10A-27 (2023) (repealed by Act 2023-92, § 5 (effective Jan. 1, 2024); *In re Adoption of K.R.S.*, 109 So.3d 176 (Ala. Civ. App. 2012); Alaska Stat. § 25.23.130(a)(1); Ariz. Rev. Stat. Ann. § 8-117(B); Ark. Code Ann. §§ 9-9-204, -215; Fla. Stat. §§ 63.042(2), 63.172(b); Ga. Code Ann. § 19-8-5; Haw. Rev. Stat. §§ 578-1, 578-16(d), (e)(1); Iowa Code §§ 600.4, 600.13(4); Ky. Rev. Stat. Ann. § 199.520(2) *S.J.L.S. v. T.L.S.*, 265 S.W.3d 804, 811-12 (Ky. Ct. App. 2008); Minn. Stat. § 259.59, subds. 1, 1a; Mo. Rev. Stat. §§ 453.010(4), 453.090(1); *B.P. v. State (In re Adoption of Luke)*, 640 N.W.2d 374, 382-83 (Neb. 2002); N.C. Gen. Stat. § 48-1-106(c), (d); N.D. Cent. Code § 14-15-14(1)(a); N.M. Stat. Ann. § 32A-5-32; Ohio Rev. Code Ann. § 3107.15(A)(1)(a); S.D. Codified Laws § 25-6-17; Tex. Fam. Code Ann. § 162.001(b)(2); Utah Code Ann. § 78B-6-117(2), (3); W. Va. Code § 48-22-703(a).

arbitrarily denied the practical, legal, and emotional advantages of adoption and a second legal parent.

II. THE WISCONSIN SUPREME COURT'S DECISION UPHOLDING WISCONSIN'S CATEGORICAL BAN ON ADOPTION BY THE UNMARRIED PARTNERS OF BIOLOGICAL PARENTS IS INDEFENSIBLE

The decision below is indefensible for several reasons, and it cries out for this Court's review.

1. The Equal Protection Clause of the United States Constitution forbids any State from "deny[ing] any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Broadly speaking, this provision "limits the authority of a State to draw such 'legal' lines as it chooses." *Stanley v. Illinois*, 405 U.S. 645, 652 (1972) (citation omitted). To that end, the Equal Protection Clause "embodies a general rule" of non-discrimination requiring that all legislative classifications be sufficiently justified. *Vacco v. Quill*, 521 U.S. 793, 799 (1997).

Not all legislative classifications demand the same level of justification. If a legislative classification "jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic" (e.g., race), it is analyzed under strict scrutiny, *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992), which means that the classification needs to be "narrowly tailored" to "'further compelling governmental interests,'" *Johnson v. California*, 543 U.S. 499, 505 (2005) (citation omitted). If, however, a classification does not jeopardize a fundamental right and does not involve a suspect class, then it is subject only to rational basis review—so the classification

need only "rationally further a legitimate state interest." *Nordlinger*, 505 U.S. at 10.[8]

Even the rational basis standard, however, "is not a toothless one," and it cannot be satisfied by implausible justifications. *Matthews v. Lucas*, 427 U.S. 495, 510 (1976). As this Court admonished more than a century ago, only "differences" that "furnish a *reasonable* basis for separate laws" can "support class legislation." *Gulf, Colo. & S.F. Ry. Co. v. Ellis*, 165 U.S. 150, 155-56 (1897) (emphasis added).

All agree that Wisconsin's ban on adoption by unmarried people in committed relationships presents a classic legislative classification amenable to federal equal protection analysis. Under Wisconsin law, a *married* person may adopt the child of his or her spouse, while an *unmarried* person in a committed relationship is categorically disqualified from doing so—even when, as here, the adoption would be in the best interests of the child. Wis. Stat. § 48.81; App. 56a.[9] Meanwhile, an unmarried person who is *not* in a committed relationship with a child's parent *can* adopt. Wis. Stat. § 48.82(1)(b).

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[8] A small group of discriminatory classifications—those "based on sex or illegitimacy"—are subject to "intermediate scrutiny," requiring that a classification be "substantially related to an important governmental objective." *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

[9] Two legislative classifications, which are the flip sides of the same coin, are at issue here: (1) the omission of an unmarried partner of a child's parent from the category of adults who may adopt a child, Wis. Stat.§ 48.82; and (2) the omission of the child of a parent who is in an unmarried relationship from the category of children who may be adopted. *Id.* § 48.81.

2.a. The Wisconsin Supreme Court's decision upholding the State's categorical bar on second-parent adoption by otherwise fit, unmarried adults in committed relationships flouts the minimum constitutional requirements of equal protection, in conflict with decisions of this Court and other federal and state courts. In upholding that categorical bar, the court applied an overly lenient form of rational basis review, devoid of "any sincere scrutiny," as Justice Karofsky correctly pointed out. App. 41a.

That was wrong. While rational basis review is the least rigorous form of equal protection scrutiny, it remains an important protection, especially when it comes to state laws intruding on personal liberty and other critical interests—including family—based on "arbitrary or irrational" distinctions. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985).

Even under the most deferential standard a state classification is unconstitutional unless it "*rationally* furthers a legitimate state purpose." *Hooper v. Bernalillo Cnty. Assessor*, 472 U.S. 612, 618 (1985) (emphasis added). Thus, a State "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne*, 473 U.S. at 446. As the first Justice Harlan observed long ago, courts are "under a solemn duty" to "give effect to the [C]onstitution" by striking down laws that "purport[] to have been enacted to protect the public health, the public morals, or the public safety," but in fact have "no real or substantial relation to those objects." *Mugler v. Kansas*, 123 U.S. 623, 661 (1887).

Otherwise, rational basis review becomes a "rule of law which makes legislative action invulnerable to constitutional assault," *Borden's Farm Prods. Co. v.*

Baldwin, 293 U.S. 194, 209 (1934)—which it was never meant to be, and which would constitute "virtual abdication" of the judicial role, rather than "genuine judicial inquiry," *Ross v. State, Dep't of Revenue*, 292 P.3d 906, 910 n.11 (Alaska 2012) (citation omitted); *see King v. State*, 818 N.W.2d 1, 86 (Iowa 2012) (Appel, J., dissenting) (explaining that overly deferential rational basis review "tends to be no review at all"); *Hettinga v. United States*, 677 F.3d 471, 482 (D.C. Cir. 2012) (Brown, J., concurring) (explaining that excessive deference under rational basis review "allows the legislature free rein to subjugate the common good"), *cert. denied*, 568 U.S. 1209 (2013). A test that calls on judges to "rationalize a basis" instead of meaningfully probing for an actual "rational basis" is less demanding than "the straight-face test"—and is thus no test at all. *Patel v. Texas Dep't of Licensing & Regul.*, 469 S.W.3d 69, 112 (Tex. 2015) (Willett, J., concurring); *see generally* Randy E. Barnett, *Scrutiny Land*, 106 Mich. L. Rev. 1479, 1485 (2008) (decrying version of rational basis review that creates a presumption of constitutionality that is, "for all practical purposes, irrebuttable").

Here, the Wisconsin Supreme Court flouted those principles. It upheld the classifications at issue on the ground that they "serve the legitimate state interest in promoting the adoption of children into stable, marital families." App. 22a. That undoubtedly is a legitimate state interest, but the court never engaged in any serious attempt to discern a real "link between classification and objective," as required under the Equal Protection Clause. *Romer v. Evans*, 517 U.S. 620, 632 (1996). Had it done so, it would have realized that, in reality, Wisconsin's legislative classifications *undermine* the very interest they purport to serve.

That is because in cases like this one (where the child's parent is in a committed relationship and her partner seeks to adopt the child), the choice is not between the child being adopted by her parent's spouse or her parent's unmarried partner. Rather, the question is whether the child will be adopted *at all*, and thus be granted a second legal parent, or whether the child will remain unadopted with a single legal parent. Under those circumstances, categorically disallowing adoption leads to *less* stability for the child, not more. By rubber-stamping the State's rationale, without even minimally testing it, the court below permitted the State to "rely on a classification whose relationship to [its] asserted goal is so attenuated as to render the distinction arbitrary or irrational," *City of Cleburne*, 473 U.S. at 446, and thus failed to "give[] substance to the Equal Protection Clause." *Romer*, 517 U.S. at 632.

The facts of this case vividly illustrate that marriage, without more, is an inapt proxy for the asserted state interest in stability for adopted children. The State itself found that adoption by T.G. would provide financial, physical, and emotional security and would clearly be in M.M.C.'s best interests. App. 56a, 66a-94a; *supra* at 8. Yet, the State's categorical disqualification of unmarried people from second-parent adoption prevented M.M.C.'s adoption from being approved, depriving her of a second legal parent and leaving her in a less stable situation that is necessarily *not* in her best interests. The connection between Wisconsin's classifications and the reasons offered for it are so "attenuated" that they cannot avoid being labeled "arbitrary or irrational." *City of Cleburne*, 473 U.S. at 446.

b. Wisconsin's categorical disqualification of unmarried people from adopting their partners' children fails rational basis for another fundamental reason: it is self-contradictory. To survive rational basis review, a legislative classification must, of course, be *rational*. As this Court has explained, while a legislature need not defend its legislative choices with "statistical evidence," those choice still need to be based on "*logical* assumptions." *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 812 (1976) (emphasis added). Or, as the Ninth Circuit has put it, the government "cannot hope to survive *rational* basis review by resorting to *irrationality*." *Merrifield v. Lockyer*, 547 F.3d 978, 991 (9th Cir. 2008) (second emphasis added). Statutory schemes that are self-contradictory are by definition irrational. At a minimum, rational basis review must be able to ferret out self-contradictory schemes.

The *Merrifield* case is illustrative. There, the Ninth Circuit addressed the constitutionality of California's licensing requirements for pest controllers. The law exempted certain pest controllers who do not use harmful pesticides (e.g., those who "engaged in the live capture" of "bats, raccoons, skunks, and squirrels") from the requirement to obtain a license, while not exempting other pest controllers (those who capture "mice, rats, or pigeons"). *Merrifield*, 547 F.3d at 981-82. In an opinion by Judge O'Scannlain, the court concluded that this regulatory distinction was unconstitutional. It explained that whatever rationale existed for exempting pest controllers who capture skunks and squirrels would exist for those who capture mice, rats, and pigeons as well, so by excluding those who capture mice, rats, and pigeons from the exemption,

the State "undercut its own rational basis for the licensing scheme." *Id.* at 992. Accordingly, the State flunked "the principle of non-contradiction," and the regulatory scheme was "not supported by a rational basis." *Id.* at 991-92.

Wisconsin's adoption classification likewise violates the "principle of non-contradiction." *Id.* at 991. The State bans the adoption of a child by the unmarried partner of the child's parent on the ground that a child needs the stability of being in a married home. App. 3a, 19a-20a. But the State permits adoption by "an unmarried adult." Wis. Stat. § 48.82(1)(b). In fact, as a general matter, an unmarried adult is treated equally to a married person for the purposes of adoption: both are eligible to adopt, neither is categorically deemed unfit based on marital status, and no automatic preference is given to one over the other. *See id.* Wisconsin cannot justify its wholesale ban on second-parent adoption by unmarried partners based on a rationale that the statutory scheme itself plainly contradicts. Like the statue in *Merrifield*, Wisconsin's statute "undercut[s] its own rational basis." 547 F.3d at 992.

c. Wisconsin's ban on adoption by unmarried partners conflicts with other aspects of the State's adoption regime, compounding its irrationality and self-contradictory nature. In other respects, the State's adoption statutes eschews categorical determinations and rests instead on individualized determinations about whether a particular adoption is in the child's best interests. Indeed, the statutory scheme does not even categorically disqualify felons, drug addicts, or adults with serious psychological conditions from adopting. *See* Wis. Stat. § 48.82. That is as it should be, for the best-interests

determination is inherently individualized, and as this Court said in *Stanley,* legal presumptions should not substitute for the case-by-case specificity that a child's best interests require; to do so "needlessly risks running roughshod over the important interests of both parent and child." 405 U.S. at 657.

In most respects, Wisconsin law tasks government agencies and courts with accounting for the many relevant factors as part of their individualized investigations and determinations as to the best interests of potential adoptive children. *See* Wis. Stat. § 48.88(2)(aj)(2)-(3) (requiring a "qualitative evaluation" of various factors, including the "civil and criminal history" and "health" of a potential adoptive parent, and permitting "a clinical assessment of the petitioner's mental health); *id.* § 48.91 (reiterating individualized, multi-factor assessment).

Wisconsin's categorical ban on adoption by unmarried partners irrationally departs from that case-specific, child-focused, and nuanced approach. As with the presumption against unmarried fathers that this Court found invalid under the Equal Protection Clause in *Stanley*, 405 U.S. at 657, the law here simply bans unmarried people from second-parent adoptions, regardless of the circumstances. Such a sharp deviation from the individualized assessments that are otherwise the linchpin of the adoption statute "forecloses the determinative issues of competence and care" and further undermines the ban's rationality. *Id.* at 656-57.

d. The Wisconsin Supreme Court relied in part on the State's interest in promoting marriage. App. 21a. Obviously, States may, and do, condition certain benefits on marriage, in order to encourage marriage. But the statute here is at best conflicted on marriage,

since it permits unmarried adults to adopt in many circumstances. Wis. Stat. § 48.82(1)(b). And, in any event, there is a difference between carrots and sledge-hammers. States may not penalize adults, much less innocent children, in the extreme—and patently coercive—form of a ban on the ability to adopt a child based solely on a decision not to marry. *Cf. Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972) (explaining that punishing child for parents' decision is "illogical and unjust").

Marriage is a deeply personal and often religious decision. The freedom to marry not only is a fundamental right but also includes the freedom *not* to marry. *See Loving v. Virginia,* 388 U.S. 1, 13 (1967) (observing that the Fourteenth Amendment includes "the freedom to marry, *or not marry*, a person of another race" (emphasis added)). States may not use their adoption laws to penalize the decision not to marry by categorically deeming unmarried individuals unfit to adopt. *Cf. Zablocki v Redhail*, 434 U.S. 374, 387 (1978) (States may not "interfere directly and substantially with the right to marry"). Instead of taking these interests into account, the Wisconsin Supreme Court summarily declared that Wisconsin's "adoption statutes do not restrict a fundamental right," and then proceeded to apply an overly lax form of rational basis review. App. 2a.

Moreover, whatever interest a State has in promoting marriage in the abstract, the means chosen here fail any applicable tailoring analysis, because the connection between adoption and any pro-marriage policy pursued by Wisconsin's adoption law is so attenuated. In *Glona v. American Guarantee & Liability Insurance Co.*, this Court held that a Texas law banning mothers of illegitimate children

from recovering in tort for the deaths of their children was unconstitutional in part because it was so unlikely to discourage illegitimacy—and so, the "causal connection" between end and means was too "farfetched" to survive constitutional scrutiny. 391 U.S. 73, 75 (1968). The causal connection between end and means is even more farfetched for Wisconsin's statute, particularly given that Wisconsin law allows unmarried adults to adopt—just so long as they are not trying to create a legal family with the child of a loving, permanent partner.

e. In short, Wisconsin's categorical disqualification of unmarried people from adopting their partners' children bears multiple indicia of irrationality: it undermines the State's own asserted interest of providing children with stable adoptive homes; it evinces a distrust of unmarried people for the purposes of second-parent adoptions that is at odds with the adoption statute's general acceptance of unmarried people as adoptive parents; and it is out of step with the holistic, case-by-case adjudication with which virtually all other characteristics are dealt with. In other words, the classifications at issue are "not only 'imprecise,' [they are] wholly without any rational basis," and are therefore unconstitutional. *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 538 (1973).

3. The Wisconsin Supreme Court's exceedingly lax version of rational basis review is particularly problematic given the nature of the classifications and interests at issue in this case.

For one thing, by categorically disqualifying an unmarried person from adopting his partner's child, Wisconsin's adoption statute effectively "penaliz[es]" *the innocent child* for the decision of two adults not to

marry, a decision over which the child has no control and for which she bears no "individual responsibility." *Weber*, 406 U.S. at 175. Punishing children for such decisions is "illogical and unjust," not rational. *Id.* at 175-76. In this case, M.M.C.'s punishment is particularly cruel, as the Wisconsin Supreme Court has barred an adoption that the State itself found to be in M.M.C.'s best interests. *Supra* at 7-8.

For another thing, this case involves an intrusion into many different intimate personal relationships: the relationship between A.M.B. and her partner, T.G.; the parent-daughter relationship between A.M.B. and her daughter, M.M.C.; the relationship between T.G. and M.M.C., which is functionally a father-daughter relationship; and the familial relationship among A.M.B., T.G., and M.M.C.

This Court has consistently demanded a fulsome application of the rational basis test where, as here, "the challenged legislation inhibits personal relationships." *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring in the judgment). The personal relationships here implicate familial bonds and "the oldest of the fundamental liberty interests recognized by this Court"—i.e., "the interest of parents in the care … and control of their children"—which only heightens the constitutional significance of those relationships. *Troxel v. Granville*, 530 U.S. 57, 65 (2000). The Wisconsin Supreme Court's analysis utterly failed to account for these crucially important interests and, instead, engaged in the most superficial kind of review.

Finally, the classifications at issue discriminate against people and children in a non-traditional family structure, where two adults have made a deeply personal choice not to get married yet remain

committed to each other and their relationship. When such discrimination is implicated, this Court has never hesitated to engage in probing rational basis review and to strike down legislative classifications, in sharp contrast to what the Wisconsin Supreme Court did here. *See, e.g., Moreno*, 413 U.S. at 535-36 (striking down statute disqualifying "otherwise eligible households" from receiving food stamps solely because those households "contain[ed] unrelated members"); *City of Cleburne,* 473 U.S. at 432, 447-50 (striking down zoning ordinance "treating a home for the mentally [disabled] differently" from homes with other types of residents); *cf. Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (explaining that government intrusion "on choices concerning family living arrangements" requires a court to "examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation").

The Wisconsin's Supreme Court's departure from well-settled principles governing review of statutes under the Equal Protection Clause warrants this Court's intervention, especially given the important interests affected by the classifications at issue.

III. THE COURT'S REVIEW IS WARRANTED GIVEN THE PROFOUNDLY IMPORTANT INTERESTS AT STAKE AND CONFUSION OVER THE MINIMUM REQUIREMENTS OF RATIONAL BASIS REVIEW

The decision below implicates fundamentally important interests involving the family, children, and parental rights. Moreover, this case provides an opportunity to provide much-needed guidance about the minimal requirements of rational basis review, so

that lower courts do not persist in confusing rational basis review with abdication of their duty to engage in judicial review. This case is a clean vehicle for doing so because the record is simple and undisputed, the case turns entirely on the validity of the classifications at issue, and the question presented was the only issue litigated below.

1. The Constitution "protects the sanctity of the family" because "the institution of the family is deeply rooted in this Nation's history and tradition." *Moore*, 431 U.S. at 503. Consistent with that history and tradition, this Court "has frequently emphasized the importance of the family." *Stanley*, 405 U.S. at 651. Indeed, few interests are as important and fundamental as those concerning the family, children, and parents. *See, e.g.*, *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (describing the right "to marry, establish a home[,] and bring up children" as "essential to the orderly pursuit of happiness"); *Troxel*, 530 U.S. at 65 (describing "the interest of parents in the care, custody, and control of their children" as "perhaps the oldest of the fundamental liberty interests recognized by this Court"); *May v. Anderson*, 345 U.S. 528, 533 (1953) (describing the "right to the care, custody, [and] management" of one's children as "far more precious … than property rights"). The statutes at issue here—which are replicated in similar form in roughly half the States across the country—undermine those interests at the expense of children, robbing them of loving adoptive homes that are in their best interests. Given the unquestionably important interests at stake, this Court should, at a bare minimum, review the constitutionality of Wisconsin's classifications.

2. This case also presents an opportunity to provide lower courts with badly needed guidance on the minimum requirements of rational basis review. A "necessary corollary to and implication of rationality as a test is that there will be situations where proffered reasons are not rational." *Doe v. Pennsylvania Bd. of Probation & Parole*, 513 F.3d 95, 112 n.9 (3d Cir. 2008). But the Wisconsin Supreme Court applied a particularly lax version of rational basis review, essentially abdicating its responsibility to enforce the Constitution's equal protection guarantee. App. 17a-22a. Indeed, Justice Karofsky stressed in her concurrence that the rationale for Wisconsin's legislative classifications is "specious" and rests on "dubious assumptions[]"—but she read this Court's precedents as blessing this type of analysis under rational basis review. *Id.* at 40-41a.

The decision below is thus emblematic of an attitude toward rational basis scrutiny that has been aptly described as a "virtual rubber-stamp" of legislative action. *Trujillo v. City of Albuquerque*, 965 P.2d 305, 314 (N.M. 1998) (citation omitted). In reality, "[t]he rational basis inquiry does not have to be largely toothless," *id.*, as many of this Court's cases show, *City of Cleburne*, 473 U.S. at 446-50; *Moreno*, 413 U.S. at 533-38; *Hooper*, 472 U.S. at 621-24; *Zobel v. Williams*, 457 U.S. 55, 61-63 (1982).

The truth is that this Court's pronouncements on the proper standard for reviewing equal protection challenges to state classifications—as well as its cases applying rational basis review—"ha[ve] not been altogether consistent," as this Court itself has acknowledged. *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 174 (1980). According to one formulation—which demands a more robust analysis and tracks Justice

Harlan's articulation in *Mugler*, 123 U.S. at 661—"for a classification to be valid under the Equal Protection Clause of the Fourteenth Amendment it 'must rest upon some ground of difference having *a fair and substantial relation* to the object of the legislation.'" *Fritz*, 449 U.S. at 174 (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) (emphasis added)). But according to another, looser formulation, a classification is valid under the Equal Protection Clause "if *any state of facts reasonably can be conceived* that would sustain it." *Id.* (emphasis added) (quoting *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79 (1911)). As the Court candidly acknowledged in *Fritz*, even "[t]he most arrogant legal scholar would not claim" that the Court's cases have "applied a uniform or consistent test" for rational basis. 449 U.S. at 176 n.10.

This Court has never fully "resolved the tensions" in its rational basis cases and pronouncements. *King*, 818 N.W.2d at 85 (Appel, J., dissenting); *see generally* Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through* Romer v. Evans, 32 Ind. L. Rev. 357 (1999) (struggling to present coherent theory that explains this Court's rational basis jurisprudence). As a result, rational basis review functions as little more than "a Magic Eight Ball that randomly generates different answers" based on "who happens to be shaking it and with what level of vigor." Clark Neily, *No Such Thing: Litigating Under the Rational Basis Test*, 1 NYU J.L. & Liberty 898, 898 (2005).

Leaving these tensions unresolved has led to confusion and frustration in the lower courts. Lower court judges have complained about the confusing and illogical nature of rational basis review as actually

practiced by many courts, referring to it as "a misnomer, wrapped in an anomaly, inside a contradiction," *Patel*, 469 S.W.3d at 98 (Willett, J., concurring), and as a form of judicial "abdicat[ion]," *Hettinga*, 677 F.3d at 481 (Brown, J., concurring), that amounts to judges "cup[ping] [their] hands over [their] eyes." *Arceneaux v. Treen*, 671 F.2d 128, 136 n.3 (5th Cir. 1982) (Goldberg, J., concurring).

With respect to confusion, the Tenth Circuit, for example, has expressed uncertainty as to whether rational basis cases in which this Court has engaged in a more searching review represent "traditional" rational-basis review, "a new category" of rational-basis review, or "exceptions to traditional rational basis review." *Powers v. Harris*, 379 F.3d 1208, 1223-24 (10th Cir. 2004), *cert. denied*, 544 U.S. 920 (2005). Meanwhile, the Sixth Circuit assures that "rational basis review is not a rubber stamp," *Hadix v. Johnson*, 230 F.3d 840, 843 (2000), and that it is deferential but "not 'toothless'," *Berger v. City of Mayfield Heights*, 154 F.3d 621, 625 (6th Cir. 1998) (citation omitted). The Ninth Circuit concedes that its rational basis review "more or less" *is* a "a judicial rubber stamp." *United States v. Sahhar*, 917 F.2d 1197, 1201 n.5 (9th Cir. 1990), *cert. denied*, 499 U.S. 963 (1991). And the Seventh Circuit describes rational basis as not only "deferential," but also "toothless." *In re Agnew*, 144 F.3d 1013, 1014 (7th Cir. 1998) (per curiam). The circuits, in short, are all over the map.

This Court's silence has also led to some lower courts sanctioning clearly irrational laws under a remarkably weak form of rational basis review that has been accurately described as the "anything goes" test. *Arceneaux*, 671 F.3d at 136 (Goldberg, J., concurring). In just one case, the Third Circuit

upheld a Pennsylvania ban on funeral establishments serving "food or intoxicating beverages" on the ground that contamination from the embalming procedure might be unhealthy, while ignoring that the statute's tolerance of serving any non-alcoholic beverage completely undermined and contradicted the purported rationale. *Heffner v. Murphy*, 745 F.3d 56, 85-86 (3d Cir.) (citation omitted), *cert. denied*, 574 U.S. 871 (2014); *see, e.g., Meadows v. Odom*, 360 F. Supp. 2d 811, 824-25 (M.D. La. 2005) (upholding safety-training requirement for professional florists), *vacated as moot*, 198 F. App'x 348 (5th Cir. 2006). Review that tolerates such irrationality is no review.

The Equal Protection Clause is one of the most important protections standing between liberty and tyranny. While forgiving, rational basis review remains a frontline protection for citizens against countless government classifications. In reviewing the decision below, this Court should take the opportunity to clarify the proper standard for rational basis review, ensuring that it remains a meaningful inquiry, not a mere formality or an abdication of the "obligation to safeguard constitutional values by ensuring *all* legislation complies with those values." *Racing Ass'n of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1, 9 (Iowa), *cert. denied*, 541 U.S. 1086 (2004).

3. This case provides a clean vehicle for resolving the question presented and providing broader guidance to lower courts. The factual record is simple and undisputed, and the question presented was the sole issue litigated below. Additionally, all agree that the adoption of M.M.C. is in her best interests, as the State itself has found. App. 56a; *supra* at 8. Thus, only Wisconsin's categorical ban on adoption by unmarried partners stands in the way of T.G. and

A.M.B.'s adoption petition being granted. This case presents a perfect opportunity to review the constitutionality of that ban and to clarify the minimal requirements of rational basis review.

* * *

Wisconsin, like nearly half the States, has erected an irrational impediment to adoption by otherwise fit adults in the form of a categorical ban on second-parent adoptions by unmarried people. In this case, the Wisconsin Supreme Court's decision upholding that ban deprived a young girl, abandoned by her biological father, of a loving and legal father, even though the State determined that the adoption was clearly in her best interests. That decision was the product of an overly lax version of rational basis review that has become all too common. This Court should grant certiorari, reverse the decision below, and make clear that rational basis review remains a real protection against arbitrary government action.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 26, 2024

APPENDIX

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[5 N.W.3d 238, 2024 WI 18]

SUPREME COURT OF WISCONSIN.

In the MATTER OF the ADOPTION OF M.M.C.:

A.M.B., Petitioner-Appellant,

T.G., Appellant,

v.

Circuit Court for Ashland County, the Honorable Kelly J. McKnight, presiding, Respondent.

No. 2022AP1334

Oral Argument: September 11, 2023
Opinion Filed: April 30, 2024

REBECCA GRASSL BRADLEY, J., delivered the majority opinion for a unanimous Court. REBECCA GRASSL BRADLEY, J., filed a concurring opinion, in which ZIEGLER, C.J., and HAGEDORN, J., joined. DALLET, J., filed a concurring opinion in which ANN WALSH BRADLEY, and PROTASIEWICZ, JJ., joined. KAROFSKY, J., filed a concurring opinion.

REBECCA GRASSL BRADLEY, J.

¶1 A creature of statute, adoption confers legal rights and duties on adopted children and their adoptive parents. The legislature has made policy choices regarding the circumstances under which children may be adopted and by whom. A.M.B. is the biological mother of M.M.C. and wishes to have her nonmarital partner, T.G., adopt M.M.C. Under the adoption statutes, T.G. is not eligible to adopt M.M.C. because T.G. is not A.M.B.'s spouse. A.M.B. and T.G.

allege the legislatively drawn classifications violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution in denying T.G. the right to adopt M.M.C. and in denying M.M.C. the right to be adopted by T.G. Because the adoption statutes do not restrict a fundamental right or regulate a protected class, we consider whether any rational basis exists for the legislative limits on eligibility to adopt a child. Among other legitimate state interests, promoting stability for adoptive children through marital families suffices for the statutes to survive this equal protection challenge; therefore, we affirm the circuit court.[1]

I. BACKGROUND

A. The Adoption Statutes

¶2 Wisconsin Stat. ch. 48, subchapter XIX, establishes legal adoption and specifies the circumstances under which a child may be adopted as well as who is eligible to adopt. Under Wis. Stat. § 48.81 (2021-22),[2] a child who is present in the State of Wisconsin when the adoption petition is filed may be adopted under any of the following four scenarios: (1) the parental rights of both parents have been legally terminated; (2) both parents are deceased; (3) the parental rights of one parent have been terminated and the other parent is deceased; or (4) "[t]he person filing the petition for adoption is the spouse of the child's parent with whom the child and

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[1] The Honorable Kelly J. McKnight, Ashland County, presiding.

[2] All subsequent references to the Wisconsin Statutes are to the 2021-22 version unless otherwise indicated.

the child's parent reside."[3] § 48.81(1)-(4); Rosecky v. Schissel, 2013 WI 66, ¶44, 349 Wis. 2d 84, 833 N.W.2d 634. Subsection (4) applies only if the child's other parent is deceased or his parental rights have been terminated. § 48.81(4)(a)-(b). Colloquially called the "stepparent" exception, this provision permits a stepparent to adopt his spouse's child while the spouse's parental rights remain intact. See Wis. Stat. § 48.92(2).

¶3 The adoption statutes additionally identify three classifications of individuals who may adopt an eligible child: "A husband and wife jointly," "either the husband or wife if the other spouse is a parent of the minor," or "an unmarried adult." Wis. Stat. § 48.82(1)(a)-(b). The statutes do not allow two unmarried adults to jointly adopt a minor. Nor do the statutes permit a nonmarital partner to adopt his partner's child. Omitting those categories of unmarried individuals from the list of eligible persons who may adopt means the law does not qualify them as adoptive parents. "Under the doctrine of expressio unius est exclusio alterius, the 'express mention of one matter excludes other similar matters [that are] not mentioned.'" James v. Heinrich, 2021 WI 58, ¶18, 397 Wis. 2d 517, 960 N.W.2d 350 (alteration in original) (quoting FAS, LLC v. Town of Bass Lake, 2007 WI 73, ¶27, 301 Wis. 2d 321, 733 N.W.2d 287); see also Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 107 (2012) ("[T]he principle that specification of the one implies exclusion of the other validly describes how people

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[3] Two additional statutory criteria apply only to children who are born in, or citizens of, foreign jurisdictions, and are not relevant in this case. Wis. Stat. § 48.81(5)-(6).

express themselves and understand verbal expression.").

¶4 The adoption subchapter also describes the legal effect of adoption on the child, the child's birth parents, and the child's adoptive parents. Wis. Stat. § 48.92. Upon entry of an order of adoption, all legal rights, duties, and "other legal consequences" of the relationships between the birth parents and the child are forever altered and "cease to exist." § 48.92(2). If, however, the adoptive parent is married to the child's birth parent, the adoption by the stepparent extinguishes the legal rights, duties, and "other legal consequences" only with respect to the birth parent who is not the spouse of the adoptive parent. § 48.92(2).

B. Facts and Procedural History

¶5 A.M.B. is the biological mother of M.M.C. and maintains a cohabitating, nonmarital relationship with her male partner, T.G. After more than a decade in a relationship with A.M.B., T.G. has become a father figure for M.M.C. and has assumed a variety of parental duties for her. The parental rights of M.M.C.'s biological father have been terminated. Based on T.G.'s fatherly bond and relationship with M.M.C., T.G. filed a joint petition with A.M.B. to adopt M.M.C.

¶6 Prior to the adoption hearing, the county department of human services generated a "Home Study Report," which included a background check of T.G., a review of T.G.'s relationship with M.M.C., and an interview with M.M.C. The interview with M.M.C. revealed she did not have a meaningful relationship with her biological father and views T.G. as her

father. The report concluded with a recommendation to grant the adoption.

¶7 On June 20, 2022, the circuit court held a hearing on the adoption petition. At the outset, the court raised concerns over its authority to grant the petition given the criteria for adoption under Wis. Stat. § 48.81, despite having determined the adoption would be in the best interests of the child, M.M.C. The circuit court cited this court's decision in Georgina G. v. Terry M., 184 Wis. 2d 492, 516 N.W.2d 678 (1994), which the circuit court summarized as precluding "an adoption to a third party who is not the spouse of the parent." Because T.G. was not married to A.M.B., the circuit court determined T.G. was not statutorily eligible to adopt M.M.C. and denied the adoption petition.

¶8 A.M.B. and T.G. appealed the circuit court's decision, arguing that Wis. Stat. §§ 48.81 and 48.92(2) violate the equal protection rights of M.M.C. and T.G. The state asked the court of appeals to affirm the denial of the adoption petition under Georgina G., 184 Wis. 2d 492, 516 N.W.2d 678, in which this court decided an earlier but substantially similar version of the governing statute[4] did not violate the equal protection clause. Because the court of appeals cannot "overrule, modify or withdraw language from a previous supreme court case[,]" Cook v. Cook, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997), A.M.B. and

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[4] After this court's decision in Georgina G. v. Terry M., 184 Wis. 2d 492, 516 N.W.2d 678 (1994), the legislature amended Wis. Stat. § 48.81 to explicitly state that the parental rights of only one biological parent must be terminated for a stepparent to adopt. 1997 Wis. Act 104, § 9. The applicable statutes in this case are otherwise identical to the statutes analyzed in Georgina G.

T.G. petitioned this court for bypass of the court of appeals, which this court granted.[5]

¶9 The adoption statutes do not implicate a fundamental right under the United States or Wisconsin Constitutions, nor do the statutes affect a protected class of individuals. Accordingly, the statutory classifications establishing eligibility to adopt or to be adopted must be rationally related to a legitimate state interest in order to withstand A.M.B.'s challenge. Because a rational basis exists for the legislature's policy choice to preclude an adoption by the nonmarital partner of a birth parent, we hold the statutes do not violate the Equal Protection Clause and we therefore affirm the circuit court's denial of the adoption petition.

II. STANDARD OF REVIEW

¶10 A.M.B. and T.G. bring a facial challenge to the constitutionality of the adoption statutes on equal protection grounds. The constitutionality of a statute is a question of law this court reviews de novo. Blake v. Jossart, 2016 WI 57, ¶26, 370 Wis. 2d 1, 884 N.W.2d 484 (citing Aicher ex rel. LaBarge v. Wis. Patients Comp. Fund, 2000 WI 98, ¶18, 237 Wis. 2d 99, 613 N.W.2d 849). A party bringing a facial challenge to the constitutionality of a statute must show that the "State cannot enforce the law under any circumstances." Id. (citing State v. Wood, 2010 WI 17, ¶13, 323 Wis. 2d 321, 780 N.W.2d 63).

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[5] In their briefing, petitioners argued the circuit court erred in applying the statutory limits on adoption despite the legislative directive in Wis. Stat. § 48.01(1) that "the best interests of the child or unborn child shall always be of paramount consideration." During oral argument, petitioners abandoned their statutory claim.

III. ANALYSIS

¶11 The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution states, "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 2.[6] A.M.B. and T.G. allege the adoption statutes are facially[7] unconstitutional because Wis. Stat. § 48.81 treats the children of single parents differently than children with two married parents and treats unmarried romantic partners differently than spouses. Petitioners claim these classifications are arbitrary and not rationally related to a valid state interest.

¶12 In reviewing the constitutionality of a statute under an equal protection analysis, the court first

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[6] Although petitioners bring their claims under the Equal Protection Clause and Article I, Section 1 of the Wisconsin Constitution, they do not provide an independent argument under the Wisconsin Constitution. Instead, petitioners treat the two constitutional provisions as providing the same protections. "As a general principle, this court treats these provisions of the United States and Wisconsin Constitutions as consistent with each other in their due process and equal protection guarantees." Blake v. Jossart, 2016 WI 57, ¶28, 370 Wis. 2d 1, 884 N.W.2d 484; accord Mayo v. Wis. Injured Patients & Fams. Comp. Fund, 2018 WI 78, ¶35, 383 Wis. 2d 1, 914 N.W.2d 678. We do not address petitioners' claim under the Wisconsin Constitution further.

[7] During oral argument, counsel for A.M.B. and T.G. described their challenge to the statutes' constitutionality as a hybrid claim comprising both as-applied and facial equal protection challenges. She later argued the statutes could not be constitutionally applied under any circumstances. Because A.M.B. and T.G. narrowed their claim to a facial challenge, we confine our analysis to the facial constitutionality of the challenged statutes.

identifies the appropriate level of scrutiny. State v. Alger, 2015 WI 3, ¶39, 360 Wis. 2d 193, 858 N.W.2d 346. We consider whether the statute implicates a fundamental constitutional right or "whether a suspect class is disadvantaged by the challenged legislation." State v. Smith, 2010 WI 16, ¶12, 323 Wis. 2d 377, 780 N.W.2d 90. If either is true, the court generally[8] applies strict scrutiny. Id.

¶13 If a fundamental constitutional right is not at stake and a protected class is not disadvantaged by the statute, the court applies rational basis review. A "relatively relaxed standard," rational basis review reflects the court's respect for the separation of powers and recognizes "the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one." Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 314, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976) (per curiam). In applying rational basis review, the court will uphold the statute provided the classification bears a rational relationship to a legitimate government interest. Blake, 370 Wis. 2d 1, ¶32, 884 N.W.2d 484.

A. Strict Scrutiny Does Not Apply

¶14 The adoption "legislative scheme does not affect a fundamental right and is not based on a suspect classification." Georgina G., 184 Wis. 2d at 518, 516 N.W.2d 678. In Georgina G., this court

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[8] The existence of a fundamental right does not automatically trigger strict scrutiny. "A law that implicates a fundamental right is not necessarily subject to strict scrutiny. Whether strict scrutiny applies sometimes depends on the degree to which the law burdens a fundamental right." State v. Alger, 2015 WI 3, ¶39 n.16, 360 Wis. 2d 193, 858 N.W.2d 346 (citation omitted).

resolved a similar constitutional challenge to the adoption statutes, holding that Wis. Stat. §§ 48.81 and 48.92 did not violate the equal protection rights of a woman who wished to adopt her same-sex partner's child. Id. at 519, 516 N.W.2d 678. The court explained:

> The adoption statutes do not violate Annette's right to equal protection. Annette is eligible to adopt a child "whose parental rights have been terminated." That is not the case here. In addition, if Annette were married, she would be eligible to adopt the child(ren) of her spouse. Again, that is not the case here. The Wisconsin legislature has enacted a statutory scheme for adoption that balances society's interest in promoting stable, legally recognized families with its interest in promoting the best interests of the children involved. The adoption proposed in this case does not fall within the confines of this constitutionally valid legislative scheme.

Id. at 518-19, 516 N.W.2d 678. T.G. is ineligible to adopt M.M.C. for the same reason Annette was ineligible to adopt her partner's child: T.G. is not married to M.M.C.'s mother. The court's reasoning in Georgina G. was sound, and we decline to overturn that precedent.[9]

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[9] Petitioners ask this court to overturn Georgina G., which involved a same-sex couple legally prohibited from marrying at the time the opinion was issued. 184 Wis. 2d at 504 n.1, 516 N.W.2d 678. This court has repeatedly recognized the importance of stare decisis to the rule of law; for this reason, we require a special justification to overturn precedent. State v. Stephenson, 2020 WI 92, ¶¶32-33, 394 Wis. 2d 703, 951 N.W.2d 819. This court commonly considers whether a prior decision is "unsound in principle" when asked to overturn it. Bartholomew

¶15 The statutes do not implicate a fundamental right of either T.G. or M.M.C. A fundamental right is "deeply rooted in this Nation's history and tradition." Washington v. Glucksberg, 521 U.S. 702, 720-21, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997) (citations omitted). Petitioners fail to identify any right deeply rooted in our history or tradition upon which the statutes intrude.

¶16 As a preliminary matter, petitioners concede there is no fundamental right to adopt. "Adoption proceedings, unknown at common law, are of statutory origin and the essential statutory requirements must be substantially met to validate the proceedings." Tennessen v. Topel, 32 Wis. 2d 223, 229, 145 N.W.2d 162 (1966); Eugene M. Haertle, Wisconsin Adoption Law and Procedure, 33 Marq. L. Rev. 37, 37 (1949). This court previously recognized adoption as a "relatively recent statutory development," and not a practice traditionally protected by our society. Georgina G., 184 Wis. 2d at 516, 516 N.W.2d 678. The federal circuit courts that have addressed this question have uniformly held

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v. Wis. Patients Comp. Fund & Compcare Health Servs. Ins. Corp., 2006 WI 91, ¶33, 293 Wis. 2d 38, 717 N.W.2d 216. After this court decided Georgina G., the United States Supreme Court declared a constitutional right of same-sex couples to marry. See generally Obergefell v. Hodges, 576 U.S. 644, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015). That change in the law does not undermine this court's reasoning in Georgina G., which did not turn on the couple's sexual orientation. As the court in Georgina G. explained, "Wisconsin's adoption statutes do not discriminate on the basis of sexual orientation or gender. Annette may not adopt Angel because Annette and Georgina are not married." 184 Wis. 2d at 518, 516 N.W.2d 678. Petitioners in this case fail to identify any developments in the law that undermine the court's decision in Georgina G.

adoption is not a fundamental right. E.g., Adar v. Smith, 639 F.3d 146, 162 (5th Cir. 2011) (en banc); Lofton v. Sec'y of Dep't of Child. & Fam. Servs., 358 F.3d 804, 811-12 (11th Cir. 2004); Lindley v. Sullivan, 889 F.2d 124, 131 (7th Cir. 1989).

¶17 A.M.B. and T.G. argue the adoption statutes must withstand strict scrutiny because they implicate the fundamental right to marriage. While marriage is undoubtedly a fundamental right, Loving v. Virginia, 388 U.S. 1, 12, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), these statutes do not implicate that right. The statutes do not compel[10] A.M.B. and T.G. to marry, nor do the statutes prohibit them from marrying. The adoption statutes do not impose any impediment to marriage, unlike laws at issue in other cases in which the United States Supreme Court has declared statutory restrictions on marriage unconstitutional. See, e.g., id. at 2, 87 S.Ct. 1817 (holding a "scheme adopted by the State of Virginia to prevent marriages between persons solely on the basis of racial classifications violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment"); Zablocki v. Redhail, 434 U.S. 374, 375-77, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978) (Wisconsin law barring marriage, without court approval, for individual "'having minor issue not in his custody and which he is under obligation to support by any court order or judgment'" violated the Fourteenth Amendment). In contrast, the adoption statutes

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[10] In their briefing, petitioners suggest the circuit court tried to force them to marry so that T.G. could adopt M.M.C. That is not accurate. In denying the adoption petition, the court noted that if T.G. married A.M.B., T.G. would qualify to adopt M.M.C. because the statutory criteria would be met.

challenged by A.M.B. and T.G. do not "control the selection of one's spouse." Roberts v. U.S. Jaycees, 468 U.S. 609, 620, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984).

¶18 Far from impeding marriage, the adoption statutes privilege the institution. Historically, states have provided benefits to married couples while denying them to unmarried individuals. "Indeed, while the States are in general free to vary the benefits they confer on all married couples, they have throughout our history made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities. These aspects of marital status include: taxation; inheritance and property rights; . . . [and] adoption rights . . . ." Obergefell v. Hodges, 576 U.S. 644, 669-70, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015); Glucksberg, 521 U.S. at 721, 117 S.Ct. 2258 (internal citation omitted) ("Our Nation's history, legal traditions, and practices thus provide the crucial 'guideposts for responsible decisionmaking' that direct and restrain our exposition of the Due Process Clause."). As the United States Supreme Court has explained, the right to marry is fundamental—at least in part—because the state has historically provided benefits to married couples: "The States have contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order." Obergefell, 576 U.S. at 670, 135 S.Ct. 2584. Privileging a married spouse with the opportunity to adopt a child does not in any way infringe the right to marry.

¶19 Because adoption is not a fundamental right under our nation's history and tradition, and Wis. Stat. §§ 48.81 and 48.92(2) do not infringe the right to

marry, we next consider whether the statutes implicate a suspect classification. The United States Supreme Court has identified distinctions based on race, national origin, and alienage as suspect classifications subject to strict scrutiny. Milwaukee Cnty. v. Mary F.-R., 2013 WI 92, ¶35, 351 Wis. 2d 273, 839 N.W.2d 581 (citing City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985)).[11] The classifications established under Wis. Stat. § 48.81 do not fit any of those categories. "The Supreme Court has not recognized any new constitutionally protected classes in over four decades, and instead has repeatedly declined to do so." Ondo v. City of Cleveland, 795 F.3d 597, 609 (6th Cir. 2015). Nothing in the Constitution supports elevating marital status to a protected class. A legislative classification based on marital status simply does not rise to the level of a suspect classification. See Califano v. Jobst, 434 U.S. 47, 53-54, 98 S.Ct. 95, 54 L.Ed.2d 228 (1977); Smith v. Shalala, 5 F.3d 235, 239 (7th Cir. 1993).

¶20 Wisconsin Stat. § 48.81 constructs distinct classifications for whom may be adopted and establishes eligibility based on the child's parental status. The statute in pertinent part provides:

> **Who may be adopted.** Any child who is present in this state at the time the petition for adoption is filed may be adopted if any of the following criteria are met:

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[11] In Obergefell, the United States Supreme Court did not make marital status a protected class; rather, it extended the fundamental right to marry to same-sex couples. 576 U.S. at 672, 135 S.Ct. 2584.

> (1) Both of the child's parents are deceased.
>
> (2) The parental rights of both of the child's parents with respect to the child have been terminated under subch. VIII or in another state or a foreign jurisdiction.
>
> (3) The parental rights of one of the child's parents with respect to the child have been terminated under subch. VIII or in another state or a foreign jurisdiction and the child's other parent is deceased.
>
> (4) The person filing the petition for adoption is the spouse of the child's parent with whom the child and the child's parent reside and either of the following applies:
>
> (a) The child's other parent is deceased.
>
> (b) The parental rights of the child's other parent with respect to the child have been terminated under subch. VIII or in another state or a foreign jurisdiction.

Wis. Stat. § 48.81(1)-(4).

¶21 A child is not eligible for adoption if she has an existing legal relationship with one of her parents. The statute provides but one exception to this rule: a stepparent may adopt the child of his spouse if the child's other parent is either deceased or his parental rights have been legally terminated. Wis. Stat. § 48.81(4)(a)-(b). M.M.C. is not eligible for adoption because her legal relationship with A.M.B. remains intact and T.G. is not M.M.C.'s stepparent because he is not married to A.M.B.

¶22 Wisconsin Stat. § 48.82(1) conditions a person's eligibility to adopt a child on the prospective adoptive parent's marital status. The statute provides in full:

> (1) The following persons are eligible to adopt a minor if they are residents of this state:
>
> (a) A husband and wife jointly, or either the husband or wife if the other spouse is a parent of the minor.
>
> (b) An unmarried adult.

Wis. Stat. § 48.82(1)(a)-(b). T.G. is an unmarried adult and M.M.C. is a minor child with one unmarried legal parent, A.M.B. As an unmarried adult, T.G. may not adopt M.M.C. because he is not married to A.M.B. and therefore does not meet the requirements of eligibility under Wis. Stat. § 48.82(1)(a).

¶23 If T.G. adopted M.M.C., Wis. Stat. § 48.92(2) would extinguish A.M.B.'s parental rights. Section 48.92 is titled "Effect of adoption" and subsection (2) states as follows:

> After the order of adoption is entered the relationship of parent and child between the adopted person and the adopted person's birth parents and the relationship between the adopted person and all persons whose relationship to the adopted person is derived through those birth parents shall be completely altered and all the rights, duties, and other legal consequences of those relationships shall cease to exist, unless the birth parent is the spouse of the adoptive parent, in which case those relationships shall be completely altered and those rights, duties, and other legal consequences shall cease to exist only with respect to the birth parent who is not the spouse of the adoptive parent and all persons whose relationship to the adopted person is derived through that birth parent.

(Emphasis added). Allowing the unmarried partner of a birth parent to adopt his partner's child with the parental rights of the birth parent intact would flout § 48.92(2), which permanently ends all rights and duties belonging to a birth parent—unless the adoptive parent is married to the birth parent.

¶24 The statutory criteria establishing eligibility to adopt or to be adopted do not involve any protected classes. Instead, Wis. Stat. § 48.81 conditions eligibility for adoption on whether a child retains a legal relationship with one of the child's parents, while Wis. Stat. § 48.82 conditions eligibility to adopt on an individual's marital status. Neither of these classifications are suspect under an equal protection analysis, and the state retains broad discretion to establish legislative classifications provided they have a reasonable basis. State v. Dennis H., 2002 WI 104, ¶32, 255 Wis. 2d 359, 647 N.W.2d 851 (citing State v. McManus, 152 Wis. 2d 113, 131, 447 N.W.2d 654 (1989)). Wisconsin Stat. §§ 48.81, 48.82, and 48.92(2) collectively balance the interests of the state in ensuring a child eligible for adoption enjoys the stability of a marital family. Because the statutes do not implicate a fundamental right or create a suspect classification, we apply rational basis review to the challenged statutes.[12]

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[12] The adoption statutes do not infringe A.M.B.'s fundamental liberty interest in raising M.M.C. See Troxel v. Granville, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). A.M.B. may maintain her nonmarital relationship with T.G., and may allow T.G. to continue serving as a father figure for M.M.C. The adoption statutes do not affect how A.M.B. chooses to raise her child, nor do they intrude on her constitutional right to direct the upbringing of M.M.C. free of governmental

B. The Statutory Classifications Have a Rational Relationship to the State's Interest in Promoting Stability for Adoptive Children.

¶25 Under rational basis review, this court will uphold legislatively chosen classifications provided the legislature has "reasonable and practical grounds for the classifications that it draws." State v. Quintana, 2008 WI 33, ¶79, 308 Wis. 2d 615, 748 N.W.2d 447 (citing McManus, 152 Wis. 2d at 130, 447 N.W.2d 654). A classification "does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'" Dandridge v. Williams, 397 U.S. 471, 485, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970) (quoting Lindsley v. Nat. Carbonic Gas Co., 220 U.S. 61, 78, 31 S.Ct. 337, 55 L.Ed. 369 (1911)). In ascertaining the existence of a rational basis, the court is not limited to those grounds the legislature may have identified; rather, "it is the court's obligation to locate or to construct, if possible, a rationale that might have influenced the legislature and that reasonably upholds the legislative determination." Sambs v. City of Brookfield, 97 Wis. 2d 356, 371, 293 N.W.2d 504 (1980).

¶26 The United States Supreme Court has long recognized the significant societal benefits marriage provides. Obergefell, 576 U.S. at 669, 135 S.Ct. 2584. The Obergefell Court explicitly acknowledged the significance of marriage for children in declaring, "[m]arriage . . . affords the permanency and stability important to children's best interests." Id. at 668, 135 S.Ct. 2584. Because marriage supplies these

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interference. See Barstad v. Frazier, 118 Wis. 2d 549, 567-68, 348 N.W.2d 479 (1984).

advantages, the state has long conferred benefits on married couples in return: "[J]ust as a couple vows to support each other, so does society pledge to support the couple, offering symbolic recognition and material benefits to protect and nourish the union." Id. at 669, 135 S.Ct. 2584. Individual states "have throughout our history made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities." Id. at 670, 135 S.Ct. 2584. The Obergefell Court specifically included adoption rights among those a state may regulate based on marital status. Id.

¶27 The adoption statutory scheme creates reasonable eligibility criteria to promote the government's interest in children being adopted into stable, permanent home environments. Wisconsin Stat. § 48.81(1) permits a minor child to be adopted if both of her biological parents are deceased, while § 48.81(2) permits adoption if the parental rights of both parents have been terminated. A child with one living parent may be adopted by the spouse of the child's parent. § 48.81(4). The state presented several justifications establishing a rational relationship between this legislative scheme and legitimate government interests, including the state's interest in promoting financial stability for adoptive children.

¶28 The state has a legitimate interest in ensuring children are adopted into "safe and stable families." Wis. Stat. § 48.01(1)(gg). The state may achieve this goal by encouraging married couples to adopt children and the legislature recognized the essential link between marriage and the welfare of children in "The Family Code." Wis. Stat. § 765.001(1). Marriage in the State of Wisconsin

creates a legal bond between two persons who "owe to each other mutual responsibility and support." § 765.001(2). This legal bond creates a series of rights and obligations between the two individuals, dissolvable only by death or divorce. Wisconsin law imposes on each spouse "an equal obligation" in accordance with financial ability "to contribute money or services or both which are necessary for the adequate support and maintenance of" the couple's "minor children and of the other spouse." § 765.001(2). The state deems "[t]he consequences of the marriage contract" to be "more significant to society than those of other contracts." § 765.001(2). Unlike a nonmarital relationship, the legal union between two individuals through marriage cannot be terminated impulsively or spontaneously; the law requires a court proceeding to terminate the contractual relationship. If a child already has a legal parent, the state reasonably concludes it would be more beneficial for that child to be adopted into a marital family, rather than by an unmarried partner of the child's legal parent. As the state argued in its brief, the fact that marriage requires legal proceedings to terminate provides "some level of assurance" the adoptive stepparent "will remain committed to the family unit and the child's upbringing."

¶29 A child joining a family with married parents enjoys a greater likelihood of a financially stable upbringing compared to a household with two unmarried parents. In the event of a divorce, Wisconsin statutes create a presumption guaranteeing both marital partners leave the relationship on financially equivalent footing. Wis. Stat. § 767.61(3). This presumption "effectuates the

policy that each spouse makes a valuable contribution to the marriage and that each spouse should be compensated for his or her respective contributions." Steinke v. Steinke, 126 Wis. 2d 372, 380-81, 376 N.W.2d 839 (1985). Nothing comparable exists for unmarried couples. If an unmarried partner decides to sever the relationship, he may freely leave without an equal division of financial assets, to the financial detriment of the remaining parent and the adoptive child. Rational basis review is a "low bar" for the government to clear in an equal protection challenge. Tiwari v. Friedlander, 26 F.4th 355, 362 (6th Cir. 2022). In this case, the state has met this burden because it is reasonable for the legislature to have concluded that a married couple would provide a more secure and financially stable home environment for adoptive children than an unmarried couple.

¶30 While A.M.B. and T.G. may provide a safe, stable, healthy, and loving home for M.M.C., the judiciary is powerless to craft an exception to the adoption law on a case-by-case basis. "A legislative classification satisfies rational basis review if any conceivable state of facts could provide a rational basis for the classification." Alger, 360 Wis. 2d 193, ¶50, 858 N.W.2d 346 (cleaned up). Petitioners cannot overcome the rational basis for the classifications established in the adoption statutes. Wisconsin has a legitimate interest in preferring the stability and security of a marital household for the upbringing of adopted children. See Lofton, 358 F.3d at 819. The statute's classifications for whom may adopt a child reflects the state's interest in preferring stable and financially secure households for adoptive children.

¶31 Petitioners argue the state draws an arbitrary and irrational distinction by permitting a

single, unmarried adult to adopt a child but not a cohabitating, unmarried partner. Compare Wis. Stat. § 48.82(1)(b) with Wis. Stat. § 48.81(4). We disagree. The legislative classifications bear a rational basis because the state may reasonably prefer a child to be adopted by a single, unmarried adult rather than be placed in foster care or another impermanent living arrangement. See Wis. Stat. § 48.01(1)(ag) (recognizing "that children have certain basic needs which must be provided for, including . . . the need for a safe and permanent family"). Because a child with one parent has permanency, the state has a legitimate interest in restricting adoption to the child's stepparent, who is more likely to provide a stable family and better outcomes for the child. Allowing married couples to adopt but not unmarried couples is consistent with the "public policy" of the state "to promote the stability of marriage and family." County of Dane v. Norman, 174 Wis. 2d 683, 689, 497 N.W.2d 714 (1993).

¶32 By allowing married couples to adopt but not unmarried couples, the state provides a benefit to married couples not afforded to unmarried couples. States "have throughout our history made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities." Obergefell, 576 U.S. at 670, 135 S.Ct. 2584. Precluding an individual from adopting his nonmarital partner's child merely makes marriage a basis for the adoption right, a classification rooted in our nation's history. Limiting adoption to married couples and single adults is neither irrational nor arbitrary because the state has legitimate reasons for the legislative classifications established under Wis. Stat. § 48.81.

¶33 Under rational basis review, the court does not judge the wisdom of the legislative classifications. Tomczak v. Bailey, 218 Wis. 2d 245, 265, 578 N.W.2d 166 (1998). Instead, we must uphold the statute's classification if there exists some rationale to justify it. Id. In establishing eligibility to adopt or to be adopted, the legislature chose to prioritize the stability of marriage for adopted children with one parent, while preferring an unmarried adoptive parent to impermanency for a child with no parents. A rational basis exists for these legislative policy choices. We hold that Wis. Stat. §§ 48.81 and 48.92(2) do not violate the Equal Protection Clause because they serve the legitimate state interest in promoting the adoption of children into stable, marital families.

IV. CONCLUSION

¶34 The Supreme Court has declared, "equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." F.C.C. v. Beach Commc'ns, Inc., 508 U.S. 307, 313, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993). Because the legislative classifications restricting adoption do not infringe a fundamental right or affect a protected class, we consider only whether any rational basis exists for the legislative limits on eligibility to adopt a child. Because the state has a legitimate interest in promoting stability for adoptive children through marital families, petitioners' equal protection challenge to Wisconsin's adoption statutes fails.

By the Court.—The judgment and order of the circuit court are affirmed.

REBECCA GRASSL BRADLEY, J. (concurring).

¶35 For most of the history of the United States, constitutional-rights litigation occurred predominantly in state courts and centered on state constitutional rights. Jeffrey S. Sutton, 51 Imperfect Solutions: States and the Making of American Constitutional Law 13 (2018). It's no wonder why. The individual rights protected by the United States Constitution did not originally apply to the states. Barron ex rel. Tiernan v. Mayor of Baltimore, 32 U.S. 243, 7 Pet. 243, 8 L.Ed. 672 (1833). Regardless, all individual rights protected under the Constitution originated from the guarantees of liberty embodied in state constitutional provisions. Sutton, supra, at 11. Even the practice of judicial review—the main vehicle by which citizens vindicate their liberties—originated in state courts. Id. at 13.

¶36 Invoking state constitutional rights, however, has been out of vogue for some time. Such claims have sometimes been relegated to "second-tier status," id. at 9, and an afterthought in legal briefs. Many commentators have noted the decline in the centrality of state constitutional claims as the United States Supreme Court federalized constitutional rights during the Warren Court era. E.g., Clint Bolick, Principles of State Constitutional Interpretation, 53 Ariz. St. L.J. 771, 774-75 (2021); Hans A. Linde, E Pluribus—Constitutional Theory and State Courts, 18 Ga. L. Rev. 165, 174-75 (1984). Over the course of the twentieth century, and especially in the 1960s, the Court incorporated most federal constitutional rights against the states through the Fourteenth Amendment. Sutton, supra, at 13. As incorporation occurred, the Court also

developed expansive—and novel—interpretations of the Constitution. As Justice William Brennan put it, the Court "fundamentally reshaped the law of this land" by "nationaliz[ing] civil rights." William J. Brennan Jr., The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights, 61 N.Y.U. L. Rev. 535, 540 (1986) [hereinafter The Bill of Rights and the States]. As a result, the relevance of state constitutions appeared to fade. Litigants stopped arguing their cases under state constitutions. See Bolick, supra, at 778 (noting state courts cannot "address constitutional issues if litigators do not raise, preserve, and meaningfully develop them"). Some state courts interpreted their state constitutions in lockstep with the federal courts' interpretation of the Federal Constitution. See generally, Sutton, supra, at 174 (defining "lockstepping" as "the tendency of some state courts to diminish their constitutions by interpreting them in reflexive imitation of the federal courts' interpretation of the Federal Constitution").

¶37 In recent years, a newfound interest in asserting state constitutional rights has emerged, which, in theory, should benefit individual liberty. State constitutional rights are just as important and worthy of protection as federal constitutional rights. And this court has a duty to enforce the rights protected under the Wisconsin Constitution. State v. Halverson, 2021 WI 7, ¶23, 395 Wis. 2d 385, 953 N.W.2d 847 (citing State v. Jennings, 2002 WI 44, ¶¶18, 38, 252 Wis. 2d 228, 647 N.W.2d 142) ("While we must follow the United States Supreme Court on matters of federal law, we have an independent responsibility to interpret and apply the Wisconsin Constitution."); King v. Vill. of Waunakee, 185 Wis.

2d 25, 59-60, 517 N.W.2d 671 (1994) (Heffernan, C.J., dissenting).

¶38 Not all arguments for enforcing state constitutional rights are rooted in text, history, and tradition; some stem from disappointment with the outcomes in certain United States Supreme Court decisions. Negative reaction to the Burger, Rehnquist, and Roberts Courts' reluctance to "innovate" new federal constitutional rights, Sutton, supra, at 15, triggered a resurgence of interest by litigants and legal commentators in asking state courts to fill the gap. For example, in two famous law review articles, Justice William Brennan urged state courts to "step into the breach" created by the Court, William J. Brennan Jr., State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489, 503 (1977), and argued that "activist intervention[s]" into democratic governance are less problematic when done by state courts. Brennan, The Bill of Rights and the States, supra, at 551. The pressure on state courts to intrude on the democratic process has intensified with the Court's landmark decisions in Rucho v. Common Cause, 588 U.S. 684, 139 S.Ct. 2484, 204 L.Ed.2d 931 (2019) (political gerrymandering), and Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 142 S.Ct. 2228, 213 L.Ed.2d 545 (2022) (abortion).

¶39 Channeling the spirit of Justice William Brennan, Justice Rebecca Dallet argues this court should abandon its past practice of construing Article I, Section 1 of the Wisconsin Constitution to provide substantially identical protections as the Fourteenth Amendment. Blake v. Jossart, 2016 WI 57, ¶28, 370 Wis. 2d 1, 884 N.W.2d 484 ("As a general principle, this court treats these provisions of the United States

and Wisconsin Constitutions as consistent with each other in their due process and equal protection guarantees."). Instead, she invites litigants to ask this court to invent constitutional rights: "[T]he lack of settled case law [discussing Article I, Section 1] should be encouraging to litigants. It is up to us—judges, lawyers, and citizens—to give effect to the fundamental guarantees of Article I, Section 1." Justice Dallet's concurrence, ¶59. As a pivotal part of her call for activism, Justice Dallet claims this court has embraced a "pluralistic approach" to constitutional interpretation in which this court "balance[s] the majority's values against the values that should be protected from society's majorities." Id., ¶53 (internal quotation marks omitted) (quoting Wis. Just. Initiative, Inc. v. Wis. Elections Comm'n, 2023 WI 38, ¶117, 407 Wis. 2d 87, 990 N.W.2d 122 (Dallet, J., concurring)). Nothing could be further from the truth or more corrosive to our democratic form of government.

¶40 It is not for judges to superimpose their values on the constitution. The Wisconsin Constitution's text "is the very product of an interest balancing by the people," which judges cannot "conduct for them anew" in each case. District of Columbia v. Heller, 554 U.S. 570, 635, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008). The balance struck by the people of Wisconsin, as embodied in the constitution, "demands our unqualified deference." New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 26, 142 S.Ct. 2111, 213 L.Ed.2d 387 (2022). What the constitution does not say is as important as what it says. If the constitution itself does not bar majorities from passing certain laws, there is no lawful basis for judges to say otherwise. Nothing in the constitution

authorizes judges to void laws that violate some judges' sense of what ought to be. There is a good reason jurists "seldom endorse[]" the views espoused by Justice Dallet openly: They contradict "the basic democratic theory of our government." John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 44-45 (1980).

¶41 Justice Dallet attempts to conceal her call for an antidemocratic power grab with the illusion of inclusive language. She intimates that future generations must each decide for themselves what the constitution means in their time: "It is up to us—judges, lawyers, and citizens—to give effect to" the constitution's words today. Justice Dallet's concurrence, ¶59 (emphasis added). When the president of Wisconsin's 1848 convention said "the pages of our constitution . . . abound[] in the declaration of those great principles which characterize the age in which we live," The Attainment of Statehood 883 (Milo M. Quaife ed., 1928), he did not mean to characterize the constitution as an empty vessel into which each generation may pour its prejudices and aspirations. He meant exactly what he said. The new constitution embodied the values and principles of that time, and those principles were to remain fixed and endure throughout the ages: "[The Wisconsin Constitution] abounds in the declaration of those great principles which characterize the age in which we live, and which, under the protection of Heaven, will—nay, must—guard the honor, promote the prosperity, and secure the permanent welfare of our beloved country." Id.

¶42 Justice Dallet ultimately advocates for the discredited "practice of constitutional revision" by a

committee of four lawyers who happen to form a majority on the court. Obergefell v. Hodges, 576 U.S. 644, 714, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015) (Scalia, J., dissenting). Should a majority of this court—four lawyers—decide to imbue the constitution with modern meanings divorced from the constitutional text and the history and traditions of this state, they will rob the people of Wisconsin of their most important liberty: "the freedom to govern themselves." Id. Although living constitutionalism is often couched in the rhetoric of flexibility and a purported need to adjust for a changing society, in practice it presents a grave threat to democracy by thwarting the people from passing legislation to accommodate changing views. Living constitutionalism invites lawyers donning robes to decide all the important issues of the day, removing their resolution from the political process altogether and depriving the people of any say in such matters. "In practice, the Living Constitution would better be called the Dead Democracy." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 410 (2012).[1]

¶43 Justice Dallet's invitation to reimagine the constitution's text with a so-called "pluralistic approach"[2] flies in the face of this court's established method of constitutional interpretation and should be

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[1] If nothing else, the idea of the living constitution is self-defeating. A constitutional right that can be "redefined" by a majority of the court from time to time is a "guarantee that guarantees nothing at all." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 407 (2012). What the court gives, the court can just as easily take away.

[2] Justice Dallet's concurrence, ¶53.

rejected.[3] As with statutory interpretation, the goal of constitutional interpretation is to ascertain the meaning of the constitutional text as it would have been understood by those who adopted it. Wis. Just. Initiative 407 Wis. 2d 87, ¶21, 990 N.W.2d 122; State ex rel. Weiss v. Dist. Bd., 76 Wis. 177, 195-96, 44 N.W. 967 (1890); State ex rel. Ekern v. Zimmerman, 187 Wis. 180, 184, 204 N.W. 803 (1925); B.F. Sturtevant Co. v. O'Brien, 186 Wis. 10, 19, 202 N.W. 324 (1925); State ex rel. Bond v. French, 2 Pin. 181, 184 (Wis. 1849); State ex rel. Kalal v. Cir. Ct. for Dane Cnty., 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110. Judges lack any authority to "rewrite the Constitution to reflect the[ir] views and values." State v. C. G., 2022 WI 60, ¶87, 403 Wis. 2d 229, 976 N.W.2d 318; Wis. Just. Initiative, 407 Wis. 2d 87, ¶21, 990 N.W.2d 122; State v. Hoyle, 2023 WI 24, ¶88, 406 Wis. 2d 373, 987 N.W.2d 732 (Hagedorn, J., concurring) ("Our founders did not establish a system of government where judges in our highest courts are unconstrained by the meaning of the law the people have enacted, free to import their own values into the Constitution."). As stated by Justice Cassoday in 1890:

> It is no part of the duty of this court to make or unmake, but simply to construe this provision of the constitution. All questions of political and governmental ethics, all

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[3] Although Justice Dallet implies her approach is the traditional interpretive method of this court, id., just last term this court rebutted that assertion and conclusively rejected her approach. Wis. Just. Initiative, Inc. v. Wis. Elections Comm'n, 2023 WI 38, ¶¶22 n.6, 23 n.7, 407 Wis. 2d 87, 990 N.W.2d 122 ("The concurrence's open pining for the freedom to go beyond the meaning of constitutional language must be and is rejected.").

> questions of policy, must be regarded as having been fully considered by the convention which framed, and conclusively determined by the people who adopted, the constitution, more than 40 years ago. The oath of every official in the state is to support that constitution as it is, and not as it might have been.

Weiss, 76 Wis. at 208, 44 N.W. 967 (Cassoday, J., concurring).

¶44 Constitutional interpretation focuses on the text of the constitution: "The authoritative, and usually final, indicator of the meaning of a provision is the text—the actual words used." Coulee Cath. Schs. v. LIRC, 2009 WI 88, ¶57, 320 Wis. 2d 275, 768 N.W.2d 868. Accordingly, "we look first to the plain meaning of the word[s] [of the constitution] in the context in which [they are] used." Bd. of Ed. v. Sinclair, 65 Wis. 2d 179, 182, 222 N.W.2d 143 (1974). This court has often consulted dictionaries contemporaneous with the text's adoption to help ascertain its meaning. E.g., id.; Weiss, 76 Wis. at 212, 44 N.W. 967 (Cassoday, J., concurring). As in statutory interpretation, this court does not engage in a "hyper-literal approach." Brey v. State Farm Mut. Auto. Ins. Co., 2022 WI 7, ¶13, 400 Wis. 2d 417, 970 N.W.2d 1. Instead, the text is "read[] [] reasonably, in context, and with a view of the provision's place within the constitutional structure." Wis. Just. Initiative, 407 Wis. 2d 87, ¶21, 990 N.W.2d 122 (citing Serv. Emps. Int'l Union, Local 1 v. Vos, 2020 WI 67, ¶28, 393 Wis. 2d 38, 946 N.W.2d 35).

¶45 The debates over a constitutional provision and the practices at the time of the provision's adoption also serve as guides in ascertaining the

text's original public meaning. Wis. Just. Initiative, 407 Wis. 2d 87, ¶21, 990 N.W.2d 122; Sinclair, 65 Wis. 2d at 182-83, 222 N.W.2d 143. As explained in State ex rel. Owen v. Donald, "we must strive by all means within our jurisdiction to put ourselves in the place the constitution makers occupied—look at the situation they had in view through the same vista they observed it, and then read out of the term the meaning they sought to embody in it." 160 Wis. 21, 81, 151 N.W. 331 (1915).

¶46 Post-enactment construction of a constitutional provision by the other branches of government may also shed light on a provision's original public meaning. Sinclair, 65 Wis. 2d at 184, 222 N.W.2d 143; Thompson v. Craney, 199 Wis. 2d 674, 680, 546 N.W.2d 123 (1996); State ex rel. Kaul v. Prehn, 2022 WI 50, ¶49, 402 Wis. 2d 539, 976 N.W.2d 821 (statutes enacted "immediately after the 1848 constitution was ratified[] reveal[ed] a circumscribed understanding of the Governor's appointment power"). Legislative or executive action is given more weight if the action occurred shortly after the adoption of the constitutional provision. See Prehn, 402 Wis. 2d 539, ¶49, 976 N.W.2d 821. Moreover, an "uninterrupted practice . . . prevailing through a long series of years" provides additional evidence as to the text's meaning. Dean v. Borchsenius, 30 Wis. 237, 246 (1872). "Lawbreaking is none the less lawbreaking because it is grayheaded with age, but when the meaning of a doubtful clause is in question, the construction placed upon it by the fathers, and concurred in through long years without question, is strongly persuasive and frequently will be held to be controlling." In re Appointment of Revisor, 141 Wis. 592, 602-03, 124 N.W. 670 (1910) (citing State ex rel.

Bashford v. Frear, 138 Wis. 536, 120 N.W. 216 (1909)). Failure to present this court with historical research may be "fatal" to a party's position. Prehn, 402 Wis. 539, ¶44, 976 N.W.2d 821; Halverson, 395 Wis. 2d 385, ¶26, 953 N.W.2d 847 (rejecting a claim under the Wisconsin Constitution because the party "provide[d] no textual or historical basis" for his argument).

¶47 Any argument construing Article I, Section 1 of the Wisconsin Constitution to protect an asserted right must be grounded in the constitution's actual text and history. "Certainly, states have the power to afford greater protection to citizens under their constitutions than the federal constitution does." State v. Roberson, 2019 WI 102, ¶56, 389 Wis. 2d 190, 935 N.W.2d 813 (citing Herb v. Pitcairn, 324 U.S. 117, 125, 65 S.Ct. 459, 89 L.Ed. 789 (1945)). But it cannot simply be assumed that the Wisconsin Constitution provides more protection for an asserted right than the Federal Constitution: "[T]he question for a state court is whether its state constitution actually affords greater protection. A state court does not have the power to write into its state constitution additional protection that is not supported by its text or historical meaning." Id.; Linde, supra, at 179. This court has stated many times that "[i]n interpreting a constitutional provision, the court turns to three sources in determining the provision's meaning: the plain meaning of the words in the context used; the constitutional debates and the practices in existence at the time of the writing of the constitution; and the earliest interpretation of the provision by the legislature as manifested in the first law passed following adoption." Craney, 199 Wis. 2d at 680, 546 N.W.2d 123 (first citing Polk Cnty. v. State Pub. Def.,

188 Wis. 2d 665, 674, 524 N.W.2d 389 (1994); and then citing State v. Beno, 116 Wis. 2d 122, 136–37, 341 N.W.2d 668 (1984)); see also Thomas ex rel. Gramling v. Mallett, 2005 WI 129, ¶122, 285 Wis. 2d 236, 701 N.W.2d 523 (citing State v. Hamdan, 2003 WI 113, ¶64 n.29, 264 Wis. 2d 433, 665 N.W.2d 785); Vincent v. Voight, 2000 WI 93, ¶30, 236 Wis. 2d 588, 614 N.W.2d 388 (citation omitted); Wagner v. Milwaukee Cnty. Election Comm'n, 2003 WI 103, ¶18, 263 Wis. 2d 709, 666 N.W.2d 816 (citing State v. City of Oak Creek, 2000 WI 9, ¶18, 232 Wis. 2d 612, 605 N.W.2d 526); Koschkee v. Taylor, 2019 WI 76, ¶23, 387 Wis. 2d 552, 929 N.W.2d 600 (citation omitted); State v. Kerr, 2018 WI 87, ¶19, 383 Wis. 2d 306, 913 N.W.2d 787 (citing State v. Williams, 2012 WI 59, ¶15, 341 Wis. 2d 191, 814 N.W.2d 460). Litigants asserting a right under Article I, Section 1 must ground their arguments in those considerations—not policy or subjective moral judgments. Our constitution and our commitment to a democratic form of government demand nothing less.

¶48 I am authorized to state that Chief Justice ANNETTE KINGSLAND ZIEGLER and Justice BRIAN HAGEDORN join this concurrence.

REBECCA FRANK DALLET, J. (concurring).

¶49 I agree with the majority's conclusion that the adoption statutes, Wis. Stat. §§ 48.81 and 48.92(2), are rationally related to a legitimate state interest, and therefore do not violate M.M.C.'s or T.G.'s rights under the Equal Protection Clause of the Fourteenth Amendment. For that reason, I join the majority opinion.

¶50 I write separately to address petitioners' alternative equal protection challenge under Article I, Section 1 of the Wisconsin Constitution. Our constitution was written independently of the United States Constitution and we must interpret it as such, based on its own language and our state's unique identity. When we do so, there are several compelling reasons why we should read Article I, Section 1 as providing broader protections for individual liberties than the Fourteenth Amendment. We cannot simply assume—as petitioners seemingly did in this case—that these different constitutional provisions mean the same thing.

I

¶51 Since the earliest days of our state's history, we have embraced our role as the principal interpreters of our state constitution. In Attorney General ex rel. Bashford v. Barstow, 4 Wis. 567, 758 (1855), Justice Abram Smith said "The people then made this constitution, and adopted it as their primary law. The people of other states made for themselves respectively, constitutions which are construed by their own appropriate functionaries. Let them construe theirs—let us construe, and stand by ours." And we have repeatedly declared that it is our duty to interpret our constitution independently of the United States Constitution. See, e.g., State v. Ward, 2000 WI 3, ¶59, 231 Wis. 2d 723, 604 N.W.2d 517; State v. Jennings, 2002 WI 44, ¶38, 252 Wis. 2d 228, 647 N.W.2d 142; State v. Halverson, 2021 WI 7, ¶23, 395 Wis. 2d 385, 953 N.W.2d 847. "Fulfilling our duty to uphold the Wisconsin Constitution as written could yield conclusions affording greater protections

than those provided by the federal Constitution." Halverson, 395 Wis. 2d 385, ¶23, 953 N.W.2d 847.

¶52 In fact, we have a long history of interpreting our constitution to provide greater protections for the individual liberties of Wisconsinites than those mandated by the federal Constitution. For example, we concluded that the Wisconsin Constitution guarantees the right to counsel at the state's expense in criminal cases more than 100 years before the United States Supreme Court recognized the same right in Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). See Carpenter v. Dane County, 9 Wis. 274, 278 (1859). More than 40 years before Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), we held that suppression was the appropriate remedy for unlawful searches and seizures under our constitution. See Hoyer v. State, 180 Wis. 407, 415, 193 N.W. 89 (1923). And we have also said that when police deliberately violate a criminal defendant's Miranda[1] rights, our constitution requires that the evidence be suppressed, even if the Fourth Amendment doesn't require the same. See State v. Knapp, 2005 WI 127, ¶2, 285 Wis. 2d 86, 700 N.W.2d 899. More recently, we have endorsed the view that "[t]he Wisconsin Constitution, with its specific and expansive language, provides much broader protections for religious liberty than the First Amendment." Coulee Cath. Schs. v. LIRC, 2009 WI 88, ¶66, 320 Wis. 2d 275, 768 N.W.2d 868.

¶53 As these examples illustrate, we have recognized greater protections for individual liberties in our constitution because it is meaningfully

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[1] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

different than the federal Constitution. "All of the differences in our state constitutions are not accidents of draftsmanship. Some of these differences reflect differences in our tradition." Shirley S. Abrahamson, Reincarnation of State Courts, 36 Sw. L.J. 951, 966 (1982). The Wisconsin Constitution reflects the unique features of our state and its laws, our history, and the "distinctive attitudes of [our] state's citizenry." See Developments in the Law—The Interpretation of State Constitutional Rights, 95 Harv. L. Rev. 1324, 1359-61 (1982). We must consider these differences—both textual and contextual—as part of the pluralistic approach to state constitutional interpretation we have applied previously. See Wis. Justice Initiative v. Wis. Elections Comm'n, 2023 WI 38, ¶117, 407 Wis. 2d 87, 990 N.W.2d 122 (Dallet, J., concurring) ("We should analyze the . . . Wisconsin constitution['s] text and history carefully, but we should also be guided by precedent, context, historical practice and tradition, and the need to balance 'the majority's values against the values that should be protected from society's majorities' " (quoting another source)).

II

¶54 Even a cursory review of Article I, Section 1 of our constitution and the Fourteenth Amendment indicates that the clauses have different meanings. Article I, Section 1 states, in its entirety:

> All people are born equally free and independent, and have certain inherent rights: among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed.

Wis. Const. art. I, § 1. Compare this with the Fourteenth Amendment which provides in pertinent part that "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." U.S. Const. amend. XIV, § 1.

¶55 Aside from two shared words—"life" and "liberty"—Article I, Section 1 and the Fourteenth Amendment are worded in dramatically different ways. Article I, Section 1 protects more than the enumerated rights of "life, liberty, or property." It declares unequivocally that all Wisconsinites have "inherent rights," a phrase that was written "to be broad enough to cover every principle of natural right, of abstract justice." Black v. State, 113 Wis. 205, 226, 89 N.W. 522 (1902) (Marshall, J., concurring). Whereas the Fourteenth Amendment's protections extend only to those rights "so rooted in the traditions and conscience of our people as to be ranked as fundamental," the inherent rights contemplated by Article I, Section 1 are not so limited. Reno v. Flores, 507 U.S. 292, 303, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993). Moreover, Article I, Section 1 begins with the clear and expansive declaration that all people are "born equally free and independent." Wis. Const. art. I, § 1. As we said over a century ago, "[t]oo much dignity cannot well be given to that declaration." State v. Redmon, 134 Wis. 89, 101, 114 N.W. 137 (1907). By contrast, the Fourteenth Amendment contains a narrower guarantee of "equal protection of the laws." U.S. Const. amend. XIV, § 1.

¶56 These textual differences are unsurprising when we consider the divergent historical contexts in which the clauses were developed and adopted. The

language of Article I, Section 1 is derived from the Virginia Declaration of Rights, which stated:

> That all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.
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> Virginia Declaration of Rights, § 1 (1776).

¶57 That language, and the language it also inspired in the overwhelming majority of other states' constitutions,[2] was "a statement of revolutionary, republican, egalitarian ideology . . . [b]ut it did not concern itself with the Fourteenth Amendment era problems of the people being denied the equal protection of the laws[.]" Robert F. Williams, A "Row of Shadows": Pennsylvania's Misguided Lockstep Approach to Its State Constitutional Equality Doctrine, 3 Widener J. Pub. L. 343, 349 (1993). The Fourteenth Amendment wasn't ratified until twenty years after Wisconsin achieved statehood and nearly a century after virtually identical language first appeared in the Virginia Declaration of Rights. Far from the "revolutionary" ideals that our Wisconsin Constitution protects, the Fourteenth Amendment

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[2] See, e.g., Vermont Const. ch. I, art. 1; Mass. Const. art. I; N.H. Const. art. I; see also Steven G. Calabresi, et al., Individual Rights Under State Constitutions in 2018: What Rights Are Deeply Rooted in a Modern-Day Consensus of the States?, 94 Notre Dame L. Rev. 49, 125 (2018) (noting that "[t]hirty-nine of the states—representing 78% of the states" have similar language in their state constitutions).

was a pragmatic step in the aftermath of the Civil War to protect the rights of African Americans who had been freed from slavery. See Jonathan F. Mitchell, Textualism and the Fourteenth Amendment, 69 Stan. L. Rev. 1237, 1248 (2017). The politics of 1868 would have been unrecognizable to the delegates to the 1848 Wisconsin constitutional convention, let alone the drafters of the Virginia Declaration of Rights in 1776. In short, the leaders of different sovereigns adopted different language at different times in history to address different problems. And for that reason, we should refrain from reflexively treating the language similarly.

III

¶58 Notwithstanding the many reasons to interpret our state constitution differently than the federal Constitution, litigants often overlook state constitutional claims, or fail to develop them fully. This case is a perfect example. Although petitioners argued that the adoption statutes at issue violate Article I, Section 1 of the Wisconsin Constitution, they offered little more than a citation to that section as support. Otherwise, the parties' briefs focused solely on the Fourteenth Amendment and federal precedent, and ignored the Wisconsin Constitution entirely.

¶59 That omission is somewhat understandable. Lawyers are surely more familiar with the extensive case law interpreting the Fourteenth Amendment. By comparison, our case law regarding Article I, Section 1 is sparse. But we must break this self-perpetuating cycle whereby lawyers fail to develop state constitutional arguments because they lack clear legal standards, which further prevents courts from developing clear legal standards. In a way, the

lack of settled case law should be encouraging to litigants. It is up to us—judges, lawyers, and citizens—to give effect to the fundamental guarantees of Article I, Section 1. And in doing so, I agree with what Justice Dodge wrote more than 100 years ago, when he said that Article I, Section 1, should "not receive an unduly limited construction." State ex rel. Zillmer v. Kreutzberg, 114 Wis. 530, 533-34, 90 N.W. 1098 (1902) (internal quotations omitted).

¶60 For the foregoing reasons, I respectfully concur.

¶61 I am authorized to state that Justices ANN WALSH BRADLEY and PROTASIEWICZ join this concurrence.

JILL J. KAROFSKY, J. (concurring).

¶62 I agree with the majority that A.M.B.'s constitutional challenge merits rational basis review and that the challenged adoption statutes have a rational basis under the law. Rational basis review presents a low bar for the state to clear. We need only to conceive of a single rational connection between the statutes and a legitimate state interest in order for us to uphold the statutes' constitutionality. Here it is rational for the legislature to connect marriage to relationship longevity, then relationship longevity to household stability, and finally household stability to the child's best interest.[1] Because there is a conceivable logic behind those connections, the statutes have a rational basis.

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[1] See Wis. Stat. § 48.01(1) ("In construing this chapter, the best interests of the child or unborn child shall always be of paramount consideration.").

¶63 But in this case, the logical threads begin to shred under the weight of any sincere scrutiny. Here, we are left with the inescapable fact that the legally rational statutes prevented an adoption that all agree would have been in A.M.B.'s best interest. This incongruent outcome exemplifies the specious connection between the statutes and their stated goal of promoting a child's best interest. At first glance the connection may seem neatly knitted together; however, closer inspection reveals nothing more than a fraying tangle of dubious assumptions, circular reasoning, and outdated values that fail to reflect the practical realities of modern family life. I write separately to call out these three fraying threads that form an ever weakening connection between our adoption statutes and the goal of a child's best interest. I urge the legislature to reform the adoption restrictions so that they truly support the best interest of every child.

¶64 The first fraying thread connecting the adoption statutes to the best interest of a child is a set of dubious assumptions regarding the stability of marital families compared to non-marital families. To be clear, the state has a legitimate interest in making sure that legal decisions involving a child are made based on the best interest of that child. And there is no doubt that it is in a child's best interest to grow up in a safe and stable household. However, conditioning adoption on the marital status of the child's parent and prospective adoptive parent reflects questionable assumptions about which types of households are stable, and which are unstable. There are many different family structures that create stability for children, and the statute's one-

size-fits-all approach can actively work against the benefit of a child, as it did in this case.

¶65 Children can and do thrive in families with single, unmarried, or married parents.[2] This case is an excellent example of the second category. T.G. has, by all accounts, demonstrated dedication and commitment to A.M.B. over the past decade, and for her part A.M.B. reports that she views T.G. as a father figure. There is no dispute that adoption would be in A.M.B.'s best interest.

¶66 Moreover, children can and do struggle in households with married parents. Married couples may, on average, stay together in the same household longer than unmarried parents, and that may look like stability from a thousand-foot-view. But inside the home, the legal pressure for a married couple to stay together, the very thing that makes the household appear stable in a superficial sense, may sometimes lead to worse outcomes for children. More than 20% of children have witnessed domestic violence within their lifetime, often resulting in long term harm to their development. David Finkelhor et al. Violence, Abuse and Crime Exposure in a National Sample of Children and Youth, 124 Pediatrics 1, 5 (2009). Even short of domestic violence, legally "stable" marriages may be rife with stressors for the children in those homes. Bali Ram & Feng Hou, Changes in Family Structure and Child Outcomes:

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[2] These former two categories are not rare, with 41% of children born to unmarried or single households between 2015 and 2021. Robert Schoen, A Multistate Analysis of United States Marriage, Divorce, and Fertility, 2005-2010 and 2015-20: The Retreat from Marriage Continues, The Demography of Transforming Families 119, 119 (2023).

Roles of Economic and Familial Resources, 31 Pol'y Stud. J. 309, 312 ("[A] large body of research now exists that finds that children are not necessarily better off living with two biological parents who are in constant marital conflict."). Even ignoring the challenges that may arise when a married couple remains together, marriage is hardly a guarantee of relationship stability given that divorce rates have continued to rise in the United States since the Civil War. Lisa D. Pearce et al., The Increasing Diversity and Complexity of Family Structures for Adolescents, 23 J. Rsch. on Adolescence 565, 592 (2018).

¶67 In short, using marriage as a litmus test for household stability reflects suspect assumptions about which family structures create stability, and what it means for a household to be stable in the first place. Marriage is treated as binary, where married parents check the stability box, unmarried parents do not, and all nuance is disregarded as insignificant. In cases such as this where unmarried parents provide stability, there is no tolerance for any exception. And, as a result, children suffer.

¶68 The second frayed thread linking the adoption statutes to the best interest of the child goal is little more than tail-wagging-the-dog circular reasoning. It goes like this: The state grants a "constellation of benefits" to married couples related to "taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decision making authority," and more. See Obergefell v. Hodges, 576 U.S. 644, 669-70, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015). The state then uses those benefits as justification to grant yet another benefit to married couples—here, adoption rights—reasoning that

because married couples are already well-supported by the state, they are in a better position to receive the new benefit. The connection between the granting of the benefit and the state's goals is thus substantially manufactured by the state, resulting in a spiral of ever-expanding benefits to married couples, leaving alternative family structures further and further behind. Perhaps the answer then is not to limit adoption benefits to married couples on the basis that the other benefits they receive make them "safe and stable,"[3] but for the legislature to expand support for alternative family structures, making them even more "safe and stable," and (from the state's point of view) suitable for adopting children.

¶69 The third unraveling thread is an outdated set of values positioning marriage as the moral center of family and society. These values sometimes lurk beneath other seemingly neutral rationales for marital benefits (such as ensuring household stability), only surfacing occasionally as a reminder to us that they are still there. Sometimes these values are front and center, serving as the main justification for a marriage-based distinction under the law.

¶70 To explain what is fundamentally wrong with using this set of values to justify marriage-based laws, I turn to an 1888 U.S. Supreme Court case, cited by the Court in Obergefell, that expounded on marriage as "the foundation of the family and of society, without which there would be neither civilization or progress." Maynard v. Hill, 125 U.S. 190, 211, 8 S.Ct. 723, 31 L.Ed. 654 (1888). At the time those words were written, the following was true about the institution of marriage. Coverture laws subordinated

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[3] See Wis. Stat. § 48.01(1)(gg).

married women to their husbands' legal control, eliminating their legal and economic identities. Christopher R. Leslie, Dissenting from History: The False Narratives of the Obergefell Dissents, 92 Ind. L.J. 1007, 1014 (2017). As a result, a married woman's property, earnings, and labor automatically belonged to her husband. Id. In addition, there was no legal recourse for a married woman whose husband had sexually assaulted her, which would be true well into the 1970s in many states. Id. at 1015. And neither married women nor unmarried women had the right to vote, to exercise civic influence in order to right these wrongs. Furthermore, marriage was limited exclusively to heterosexual relationships. And, marriages between people of differing races and ethnicities were widely banned. In short, if marriage was the foundation of the family and of society in 1888, there was something rotten at the core of that foundation.

¶71 Times have changed, of course, but the justification that marriage is the moral core of society and the family is as weak as it ever was. With only about half of U.S. adults in a marriage, first marriages beginning later in life, and increasing divorce rates over time, Americans are spending more and more of their adult lives unmarried.[4]

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[4] See Gretchen Livingston, The Changing Profile of Unmarried Parents, Pew Research Center (Apr. 25, 2018), https://perma.cc/RC6T-NFGE ("The growth in unmarried parenthood overall has been driven by several demographic trends. Perhaps most important has been the decline in the share of people overall who are married. In 1970, about seven-in-ten U.S. adults ages 18 and older were married; in 2016, that share stood at 50%. Both delays in marriage and long-term increases in divorce have fueled this trend. In 1968, the median

Unsurprisingly then, nearly one third of children live in a single-parent home. Pearce et al., supra, at 592. Yet many Americans still desire to create families. Functional, stable families continue to form as alternative family structures proliferate and garner greater societal acceptance. See Frank F. Furstenberg et al., Kinship Practices Among Alternative Family Forms in Western Industrialized Societies, 82 J. Marriage Fam. 1403 (2020). The notion that marriage serves as the foundation of society is at best outdated, and at worst misogynistic. It provides scant justification for laws that distinguish based on marital status.

¶72 In sum, I agree that the adoption statutes have a rational basis given the low bar that the legal analysis requires. But upon closer inspection, the connection between the adoption statutes and a child's best interest appears increasingly threadbare. Remove the outdated, the questionable, and the merely self-perpetuating, and soon you are left with very little connection at all.

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age at first marriage for men was 23 and for women it was 21. In 2017, the median age at first marriage was 30 for men and 27 for women. At the same time, marriages are more likely to end in divorce now than they were almost half a century ago. For instance, among men whose first marriage began in the late 1980s, about 76% were still in those marriages 10 years later, while this figure was 88% for men whose marriages began in the late 1950s.").

U.S. Const., amend. XIV

Section 1

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

* * *

Wis. Stat. § 48.81

48.81. Who may be adopted. Any child who is present in this state at the time the petition for adoption is filed may be adopted if any of the following criteria are met:

(1) Both of the child's parents are deceased.

(2) The parental rights of both of the child's parents with respect to the child have been terminated under subch. VIII or in another state or a foreign jurisdiction.

(3) The parental rights of one of the child's parents with respect to the child have been terminated under subch. VIII or in another state or a foreign jurisdiction and the child's other parent is deceased.

(4) The person filing the petition for adoption is the spouse of the child's parent with whom the child and the child's parent reside and either of the following applies:

(a) The child's other parent is deceased.

(b) The parental rights of the child's other parent with respect to the child have been terminated under subch. VIII or in another state or a foreign jurisdiction.

(5) Section 48.839 (3) (b) applies.

(6) The child is being adopted under s. 48.97 (3).

Wis. Stat. § 48.82

48.82. Who may adopt.

(1) The following persons are eligible to adopt a minor if they are residents of this state:

(a) A husband and wife jointly, or either the husband or wife if the other spouse is a parent of the minor.

(b) An unmarried adult.

(3) When practicable and if requested by the birth parent, the adoptive parents shall be of the same religious faith as the birth parents of the person to be adopted.

(4) No person may be denied the benefits of this subchapter because of a religious belief in the use of spiritual means through prayer for healing.

(5) Although otherwise qualified, no person shall be denied the benefits of this section because the person is deaf, blind or has other physical handicap.

(6) No otherwise qualified person may be denied the benefits of this subchapter because of his or her race, color, ancestry or national origin.

Wis. Stat. § 48.88

48.88. Notice of hearing; investigation.

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1. In determining whether the petitioner's home is suitable for the child, the agency or tribal child welfare department making the investigation shall consider whether the petitioner is fit and qualified to care for the child, exercises sound judgment, does not abuse alcohol or drugs, and displays the capacity to successfully nurture the child.
2. The investigation shall be conducted using an assessment system that is approved by the department. The assessment system shall provide a reliable, comprehensive, and standardized qualitative evaluation of a petitioner's personal characteristics, civil and criminal history, age, health, financial stability, and ability to responsibly meet all requirements of the department.
3. If the agency or tribal child welfare department making the investigation has special concern as to the welfare of the child or the suitability of the placement, the investigation may include a clinical assessment of the petitioner's mental health or alcohol or other drug use by an employee of the agency or tribal child welfare department who is not employed in the unit of the agency or tribal child welfare department that is making the

investigation or by a person who is not employed by that agency or tribal child welfare department. A person who provides such an assessment shall be a licensed psychologist, licensed psychiatrist, certified advanced practice social worker, certified independent social worker, licensed clinical social worker, or licensed professional counselor.

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Wis. Stat. § 48.91

48.91. Hearing; order.

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(3) If after the hearing and a study of the report required by s. 48.88 and the recommendation required by s. 48.841 or 48.89, the court is satisfied that the necessary consents or recommendations have been filed and that the adoption is in the best interests of the child, the court shall make an order granting the adoption. In determining whether the adoption is in the best interests of an Indian child, the court shall comply with the order of placement preference under s. 48.028(7)(a) or, if applicable, s. 48.028(7)(c), unless the court finds good cause, as described in s. 48.028(7)(e), for departing from that order. The order may change the name of the minor to that requested by petitioners.

Wis. Stat. § 48.92

48.92. Effect of adoption.

(1) After the order of adoption is entered the relation of parent and child and all the rights, duties and other legal consequences of the natural relation of child and parent thereafter exists between the adopted person and the adoptive parents.

(2) After the order of adoption is entered the relationship of parent and child between the adopted person and the adopted person's birth parents and the relationship between the adopted person and all persons whose relationship to the adopted person is derived through those birth parents shall be completely altered and all the rights, duties, and other legal consequences of those relationships shall cease to exist, unless the birth parent is the spouse of the adoptive parent, in which case those relationships shall be completely altered and those rights, duties, and other legal consequences shall cease to exist only with respect to the birth parent who is not the spouse of the adoptive parent and all persons whose relationship to the adopted person is derived through that birth parent. Notwithstanding the extinction of all parental rights under this subsection, a court may order reasonable visitation under s. 48.925.

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