No. _____

In the Supreme Court of the United States

LINSAY LORINE GATSBY,
N/K/A LINSAY LORINE WALLACE,
Petitioner,

v.

KYLEE DIANE GATSBY,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether both members of a same-sex married couple have the same fundamental right as opposite-sex married couples to participate in the care, custody, and control of children they agree to conceive and together raise from birth.

PARTIES TO THE PROCEEDING

Petitioner, Plaintiff-Appellant below, is Linsay Lorine Gatsby, now known as Linsay Lorine Wallace.

Respondent, Defendant-Appellee below, is Kylee Diane Gatsby.

RELATED PROCEEDINGS

No other case is directly related to the case in this Court within the meaning of Rule 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Linsay Lorine Gatsby, now known as Linsay Lorine Wallace, respectfully petitions this Court for a writ of certiorari to review the judgment of the Idaho Supreme Court in this case.

OPINIONS BELOW

The opinion of the Idaho Supreme Court (Pet.App.1a-47a) is reported at 495 P.3d 996. The opinions of the district court (Pet.App.93a-134a) and of the magistrate division of the district court (Pet.App.59a-92a) are unreported.

JURISDICTION

The Idaho Supreme Court entered its judgment on September 24, 2021. On December 16, 2021, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including February 7, 2022. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution and pertinent portions of the Idaho Code are reproduced at Pet.App.48a-58a.

INTRODUCTION

This case presents a question of vital importance to same-sex couples and their children: whether married same-sex couples who resolve to have children and raise those children together have the same constitutionally-protected right as opposite-sex couples to share in the custody, care, and upbringing of those children.

This Court's cases should have provided a clear answer. This Court has long recognized that "'[t]he right to "marry, establish a home and bring up children" is a central part of the liberty protected by the Due Process Clause.'" *Obergefell v. Hodges*, 576 U.S. 644, 668 (2015) (indirectly quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)). In *Obergefell*, this Court held that same-sex couples enjoy those same fundamental rights.

The Idaho Supreme Court's divided decision in this case, however, nullifies those guarantees. Petitioner Linsay Wallace and her wife Kylee resolved to have a child. Although they agreed that Kylee would carry that child, Linsay was involved in the pregnancy at every step. She herself artificially inseminated Kylee in their home, accompanied Kylee to prenatal visits, attended the birth, and chose the child's first name. Linsay and Kylee together filled out a birth certificate worksheet affirming that they were *both* P.G.'s mothers. And Idaho issued a birth certificate attesting to that fact. Linsay and Kylee thereafter raised P.G. together in their marital home.

In 2017, after Kylee was arrested for committing domestic battery on Linsay, Linsay ended the marriage. Idaho's courts, however, granted full custody of P.G. to Kylee, finding that because Kylee was "the natural, biological parent of [P.G.]," while Linsay was not, Kylee—and only Kylee—had a "fundamental constitutional ... right to the custody, care, and control of [P.G.]" Pet.App.4a. And because Linsay purportedly failed to comply with a state statute imposing burdens generally inapplicable to opposite-sex couples, Idaho's courts concluded that she could not obtain parental rights as a matter of state law either.

That decision returns same-sex families and children to the same instability, insecurity, and second-class treatment against which *Obergefell* was intended to "safeguard." 576 U.S. at 668. Under the Idaho Supreme Court's decision, half of every same-sex married couple would lack a constitutional interest in the care and custody of children conceived and raised during their marriage—demeaning same-sex marriage, treating same-sex couples as lesser than opposite-sex couples, harming their families, and depriving same-sex families of full and equal recognition under the Constitution. Those results are incompatible with this Court's precedents and at odds with the results reached by other state appellate courts. This Court's review is warranted.

STATEMENT OF THE CASE

A. Factual Background

Linsay and Kylee Gatsby were married in June 2015. Pet.App.2a. Like many married couples, they decided to have a child together. Because Linsay had had certain medical issues, Linsay and Kylee decided that Kylee would carry their child. *See id.*; Rec. 120 (¶ 3), 125.[1] Linsay, Kylee, and a male friend signed an artificial insemination agreement, listing the male friend as the sperm "donor" and Linsay and Kylee as the "recipient." Pet.App.2a; Rec. 125-27. The agreement affirmed that the parties intended for Linsay and Kylee to have parental rights to the child

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[1] "Rec." refers to the Clerk's Record on Appeal in Idaho Supreme Court Case No. 47710 (filed Aug. 23, 2017). "Tr." refers to Transcript of Trial held July 26-27 and August 1, 2018, No. CV01-17-15708 (Idaho 4th Jud. Dist. Ct.).

and for the donor to have no parental rights or obligations. *Id.*

Linsay herself inseminated Kylee in their home. Trial Tr. ("Tr.") at 282:1-284:19. After Kylee became pregnant, Linsay attended prenatal visits, prepared for the child's arrival, and chose the child's first name. Rec. 121-22 (¶¶ 13-15). On October 29, 2016, Kylee gave birth to a daughter, P.G. Pet.App.2a. Linsay attended the birthand cut P.G.'s umbilical cord. Tr. at 289:17-290:25. On the birth certificate worksheet that Linsay and Kylee filled out at the hospital, and which Kylee signed, the couple struck through the word father, handwrote "mother" in its place, and listed Linsay in that spot. Pet.App.2a-3a.

Idaho subsequently issued a birth certificate listing both Kylee and Linsay as P.G.'s mothers. Pet.App.3a. Following P.G.'s birth, Kylee and Linsay raised P.G. together in their shared marital home. *Id.* Both Kylee and Linsay shared in caregiving and held themselves out as P.G.'s parents. *Id.*

In July 2017, however, Linsay and Kylee's relationship deteriorated after Kylee assaulted Linsay while intoxicated. *Id.* Kylee was arrested for domestic violence and pled guilty to domestic battery. *Id.* Kylee had also committed an act of domestic violence against another domestic partner years earlier, resulting in another battery charge. *Id.*; *see also* Rec. 104. Kylee's arrest resulted in a no contact order ("NCO") being issued which prohibited Kylee from seeing P.G. except at daycare. Pet.App.3a.

Kylee violated the NCO repeatedly, including by getting into a physical altercation in front of P.G. while again intoxicated. *See, e.g.*, Rec. 106, 109. The

judge reprimanded Kylee for being a danger to herself and others. *Id.* at 106.

Linsay ultimately filed for divorce from Kylee. Pet.App.3a. Due to the NCO, Linsay had sole custody of P.G. from Kylee's arrest on July 3, 2017, until December 27, 2017, when an Idaho magistrate court issued a temporary order giving Linsay and Kylee equal custody. *Id.* Thereafter, Linsay and Kylee shared custody for nearly a year, until the magistrate court issued a final determination of custody on November 15, 2018. *Id.*

B. Idaho's Statutory Scheme For Recognizing A Child's Parents

1. Under Idaho Code § 39-255(e)(1), if a mother is married at the time of either conception or birth, or between conception and birth, absent limited exceptions, "the name of the husband shall be entered on the certificate as the father of the child." Beginning in 2014, if an Idaho birth mother delivered a child and was married to a female spouse at the time of birth, conception, or anytime between, the mother's female spouse could be listed as the second parent on the Idaho Certificate of Live Birth. Rec. 433-35.

2. Idaho's practice of treating a birth mother's spouse as a child's second parent accords with longstanding common law principles. "[T]he common law has always presumed that a child conceived during wedlock is the legitimate offspring of his legal parents." *Alber v. Alber,* 472 P.2d 321, 324 (Idaho 1970) (citing Homer H. Clark, *The Law of Domestic Relations* § 5.1, at 155 (1968)). Indeed, "[t]he presumption of legitimacy was a fundamental principle of the common law," reflecting the law's strong aversion to declaring children illegitimate and

the similarly vital interest in promoting the "'peace and tranquility of States and families.'" *Michael H. v. Gerald D.*, 491 U.S. 110, 124-25 (1989) (citation omitted).

3. In 1982, Idaho enacted a statute (the "Artificial Insemination Act" or "AIA") addressing the relationship between a married couple seeking to conceive via artificial insemination and the child that results from that conception. To that end, Idaho Code § 39-5405(3), provides:

> The relationship, rights and obligation between a child born as a result of artificial insemination and the mother's husband shall be the same for all legal intents and purposes as if the child had been naturally and legitimately conceived by the mother and the mother's husband, if the husband consented to the performance of artificial insemination.

The AIA separately addressed who could perform artificial insemination and in what circumstances. Thus, it provided that "[a]rtificial insemination shall not be performed upon a woman without her prior written request and consent and, if she is married, the prior written request and consent of her husband." H.R. 733, 46 Leg., 2nd Reg. Sess. § 3(1) (Idaho 1982) ("H.R. 733"). It also provided that only licensed physicians and persons under their supervision could "select artificial insemination donors and perform artificial insemination." *Id.* § 2. And it provided that a woman's request and consent shall be filed by the

physician who performs the artificial insemination with the registrar of vital statistics. *Id.* § 3(2).

The Act originally empowered Idaho's Board of Health and Welfare to promulgate rules and forms of reporting. Resulting regulations provided that the form for reporting the birth of a child who may have been conceived by artificial insemination "shall be signed and dated by the wife, husband, and the physician who participates in the procedure of artificial insemination" and must include the statement that "[t]he undersigned husband and wife do hereby consent of their own free will and choice to said artificial insemination." Idaho Admin. Procedures Act 16.02.08.900 § 900.01 (repealed 2019).

Whatever the intent behind that form and filing procedure, Idaho has acknowledged that it serves no purpose and long ago fell out of use. Thus, the Idaho Department of Health and Welfare has explained that there has "*never been such a filing with the Bureau of Vital Records (BVR) and no purpose exists for either the BVR or the DHW to receive the consent forms.*" Pet.App.35a (Stegner, J., dissenting) (citation omitted). Accordingly, the Department acknowledged that it "does not take any steps to require physicians to file the consent forms provided in Idaho Code § 39-5403." Rec. 435 (¶ 2). Instead, the Department "consistently applies the presumption of parenthood provided in Idaho Code § 39-5405(3). That is to say, regardless of the method of conception, the birth mother's spouse is listed as a parent on the child's birth certificate." *Id.* "Although the statute refers to 'the mother's husband,' since late 2014 the Department has applied the statute in a gender-neutral manner. Even if the birth mother's spouse is

a woman, she is listed as a parent on the birth certificate." *Id.*

Consistent with its long obsolescence, Idaho in 2021 amended the AIA to expunge the requirement that a couple's written request and consent to artificial insemination be filed with the state, while also eliminating the Board of Health and Welfare's authority to prescribe a specific method of reporting consent. *Compare* Pet.App.51(a) (Idaho Code § 39-5403(1)-(2)), *with* H.R. 733 § 3.

C. Proceedings Below

On November 15, 2018, the magistrate court granted sole custody of P.G. to Kylee. Pet.App.3a. At the heart of that decision was the court's view that Kylee and Linsay were differently situated because Kylee was "the natural, biological parent of [P.G.]," while Linsay was not. Pet.App.4a; *see also* Pet.App.79a. On that basis, the magistrate court concluded that Kylee—and only Kylee—had a "fundamental constitutional ... right to the custody, care, and control of [P.G.]." *Id.* Because Linsay was not P.G.'s biological parent, the court believed her rights were not equal to Kylee's. Pet.App.89a; *see also* Pet.App.24a-25a. Indeed, the court believed that Linsay even lacked standing to seek custody of P.G. Pet.App.2a

The court also found that Linsay had failed to become a legal parent through other avenues. The court acknowledged that under Idaho law, when a child is born to a married couple, the husband of a child's mother is presumed to be the child's father. *See, e.g.*, *Alber*, 472 P.2d at 326-27. But because both Linsay and Kylee are women, such that Linsay could

not be P.G.'s biological father, the court found the presumption to be rebutted.

The court also found that Linsay had no parental rights under Idaho's AIA. Although it was undisputed that Linsay consented to (and indeed performed) Kylee's artificial insemination, the magistrate court concluded that Linsay was not entitled to the same relationship with P.G. "as if the child had been naturally and legitimately conceived by the mother and the mother's husband," Idaho Code § 39-5403(3), because she had not filed a particular form with the Idaho Department of Health and Welfare affirming her consent. The court faulted Linsay for not submitting that form even though (1) no other Idaho couple had ever filed that form; and (2) the Department of Health of Welfare itself issued a birth certificate identifying Linsay as P.G.'s mother.

Even assuming arguendo that Linsay had standing to seek custody of P.G., the magistrate court reiterated its view that Linsay and Kylee do not have equal and competing fundamental interests because Kylee is P.G.'s natural parent, and Linsay is not. Pet.App.79a-80a. As a result, the court explicitly afforded only minimal weight to Linsay's interests. Pet.App.89a. Thus, while the court acknowledged that "[P.G.] does have a bond with Linsay," and that "Kylee drank alcohol excessively and she committed acts of domestic violence on her partners," the court found that Kylee's "fundamental and constitutional rights to raise her child should [not] be restricted." Pet.App.24a-25a. In its view, because Kylee was "the natural, biological parent," she alone had the right "to the care, control, and custody of the child." Pet.App.4a.

The district court affirmed. It agreed that Linsay had no parental rights to P.G. under Idaho's common law marital presumption of paternity because she admittedly lacked a biological relationship with the child. Pet.App.101a-02a. The district court further found that the presumption was "never gender neutral" and was rebutted in the case of a same-sex spouse who necessarily had no biological connection to the child. Pet.App.102a-03a (citation omitted).

The court agreed that the AIA did not confer any rights on Linsay because she had not filed the required consent form with the State. Pet.App.105a-07a. And it found the magistrate court had not abused its discretion in evaluating whether Linsay would have been entitled to custody if she had had standing. The district court concluded the magistrate court had appropriately given "'special weight'" to Kylee's interests and held Linsay to a higher burden of proof because Linsay was a "non-parent" to P.G. Pet.App.24a (citation omitted); *see also* Pet.App.128a-29a.

The Idaho Supreme Court affirmed in a divided decision. The Idaho Supreme Court majority concluded that the AIA "is the controlling statute in this case" and that "neither the common law marital presumption of paternity nor the Paternity Act should be applied to resolve this case." Pet.App.8a-9a. It found that whether Linsay could seek parental rights "can be resolved by the AIA alone." Pet.App.9a. And it "affirm[ed] the district court in holding that Linsay could not obtain parental rights to the child under the AIA because she did not comply with all the requirements of the law." Pet.App.15a.

The court majority acknowledged that the AIA provides that "[i]f the mother is married, *and the*

husband has consented to artificial insemination, then the husband and resulting child have the same rights and obligations with respect to each other as if the child had been conceived naturally by the mother and husband." Pet.App.10a (citation omitted). But the majority found that "even if it is inferred from the circumstances that Linsay consented to Kylee being inseminated," Linsay could not benefit from the AIA because she had not complied with "all" of its provisions, Pet.App.15a—including its requirements to allow a physician to perform the insemination and "'select [the] artificial insemination donor[;]'" and to submit the required consent form with the signature of a physician. Pet.App.10a-11a (quoting Idaho Code § 39-5402).

The court also rejected Linsay's constitutional arguments. Although married, opposite-sex couples are not generally required to allow physicians to select the biological fathers of their children, nor file forms with the State to establish parental rights, the majority found the AIA posed no Equal Protection Clause problem. Pet.App.11a. And although the AIA uses gender-specific terms like "mother" and "mother's husband," the court majority held that the AIA's language could be re-read in a "gender-neutral manner" such that it determined the rights of a birth "mother's spouse," not just those of a birth "mother's husband." *Id.*

Although Linsay argued that the Due Process Clause protects the fundamental right of spouses in same-sex marriages to have custody of a child conceived and born during the marriage, the court majority suggested that due process was satisfied by the magistrate court's custody analysis, finding that the magistrate court correctly applied this Court's

decision in *Troxel v. Granville*, 530 U.S. 57 (2000), by affording "'special weight'" to the "'fundamental right'" of a "fit parent[]"—meaning Kylee—to restrict the access of a "third party"—meaning Linsay—to Kylee's child. Pet.App.24a (citatioms omitted).

Justice Stegner dissented. In his view, the majority's holding meant that "the core legal protections of a child conceived by artificial insemination during the course of a marriage would be determined strictly by the filling out and filing of a particular piece of paperwork, rather than by the documented actions and intentions of the spouses." Pet.App.34a-35a. He noted that the court's decision "renders Linsay's marriage to Kylee a nullity, and eviscerates the legal protections for their child" that ordinarily attend to marriage, in sharp tension with this Court's assurance that recognition of the right to same-sex marriage would "'safeguard[] children and families.'" Pet.App.36a (quoting *Obergefell*, 576 U.S. at 667).

REASONS FOR GRANTING THE PETITION

This case presents the vitally important question of whether both spouses in a same-sex marriage possess the same fundamental right to raise children conceived during their marriage as do spouses in an opposite-sex marriage. The Idaho Supreme Court held that when a married same-sex couple chooses to have a child, but conceives that child without involving the state or a third-party physician, the biological parent alone has the right to raise and make decisions with respect to their child. The decision below deprives married same-sex parents of the same fundamental rights enjoyed by married opposite-sex parents and conflicts with the decisions

of this Court and other state courts. The important question presented warrants review.

I. The Idaho Supreme Court's Decision Is Irreconcilable With This Court's Decisions

A. The Decision Below Conflicts With This Court's Due Process Decisions

1. "[T]he interest of parents in the care, custody, and control of their children[] is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). Nearly a century ago, this Court recognized that the liberty protected by the Due Process Clause includes the right "to marry, establish a home and bring up children." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). "[T]he rights to conceive and to raise one's children have been deemed 'essential'" and among the "'basic civil rights of man.'" *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (citations omitted).

This Court has since repeatedly reaffirmed "there is a constitutional dimension to the right of parents to direct the upbringing of their children." *Troxel*, 530 U.S. at 65; *see, e.g.*, *Stanley*, 405 U.S. at 651 ("[T]he interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.'" (citation omitted)); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected.").

2. A protected liberty interest in the care and custody of one's children arises not from the existence of a "biological" relationship, but from "the historic

respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family." *Michael H. v. Gerald D.*, 491 U.S. 110, 123 (1989) (Scalia, J.). "[T]he 'unitary family[]' is typified, of course, by the marital family ...." *Id.* at 123 n.3.

The Constitution's solicitude for marriage and the family relationships that develop therein reflects the important and deeply-rooted role played by marriage in our society. Marriage has long been "the foundation of the family in our society," *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978), and "one of the vital personal rights essential to the orderly pursuit of happiness by free men," *Loving v. Virginia*, 388 U.S. 1, 12 (1967). Accordingly, "the right to marry is of fundamental importance for all individuals," *Zablocki*, 434 U.S. at 384.

The institution of marriage is also so deeply "rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (Cardozo, J.). This Court has noted that marriage involves the exercise of "'a right of privacy older than the Bill of Rights.'" *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 843 (1977) (citation omitted); *see also Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (pluarity op.) ("[T]he Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition.").

This fundamental right to marry is closely tied to and encompasses the right to create and raise a family. This Court has thus explained that the rights "to 'marry, establish a home, and bring up children'" comprise part of a "unified whole." *Obergefell v.*

Hodges, 576 U.S. 644, 668 (2015) (quoting *Zablocki*, 434 U.S. at 384). Indeed, "legal custody of children is ... a central aspect of the marital relationship." *Quilloin*, 434 U.S. at 256. So too is the right to create a family. *See, e.g.*, *Obergefell*, 576 U.S. at 669 ("The constitutional marriage right has many aspects, of which childbearing is ... one."). "Choices about marriage, family life, and the upbringing of children" are thus closely linked, and together protected by the Fourteenth Amendment. *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996).

3. This Court's cases confirm that a married couple's liberty interest in the care and custody of their children vests not from genetics, but the liberty afforded married couples to structure their own family life.

a. This Court has repeatedly rejected the contention that biological connection is the touchstone of whether an adult enjoys a liberty interest in the care and custody of a child.

Reflecting the "clear distinction between a mere biological relationship and an actual relationship of parental responsibility," this Court has "'assumed that each married parent after divorce has some substantive due process right to maintain his or her parental relationship,'" while finding the same not necessarily true for an "'unwed parent.'" *Lehr v. Robertson*, 463 U.S. 248, 259-60 (1983) (citation omitted). That is because "[p]arental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring." *Id.* (emphasis and citation omitted).

Similarly in *Quilloin*, this Court affirmed that the interest of an unmarried biological father in the care

and custody of his biological child was "readily distinguishable" from a married father who later separated or divorced from the child's mother. 434 U.S. at 255-56. This Court thus had little difficulty approving the adoption of the father's child by the mother's husband—thereby "giv[ing] full recognition to a family unit already in existence." *Id.* at 255.

b. As Justice Scalia explained in *Michael H.*, the liberty interest in the care and custody of one's children most readily springs from marriage—the quintessential "protected family unit under the historic practices of our society." 491 U.S. at 124. The law's solicitude for marriage is so strong, in fact, that it historically has protected the interest of a married couple in raising a child *even against* the competing claims of a biological parent.

In *Michael H.*, the Court upheld California's near conclusive presumption that "the issue of a wife cohabitating with her husband" is a child of the marriage. *Id.* at 117 (quoting Cal. Evid. Code § 621(a) (1981)). The Court rejected the biological father's claim that his genetic relationship entitled him to displace the mother's husband as the party to whom parental rights attached. This Court noted our traditions have instead "protected the marital family ([the mother's husband], [the mother], and the child they acknowledge to be theirs [but is in fact not]) against the sort of claim [the biological father] asserts." *Id.* at 124. As the plurality noted, the presumption that a child born into a marriage was the issue of that marriage was "a fundamental principle of the common law." *Id.* Although the plurality acknowledged that biological fathers can, in many states, seek to rebut that presumption, it noted that it was "not aware of a single case, old or new," in

which a state had "in fact award[ed] substantive parental rights to the natural father of a child conceived within, and born into, an extant marital union that wishes to embrace the child." *Id.* at 127.

c. Whatever the difficulties that arise in other contexts, this Court has never once questioned that a liberty interest attaches to a married couple's care and custody of children that they together work to conceive and raise from birth.

For good reason. "[D]ecisions relating to procreation, childbirth, child rearing and family relationships" are closely bound together with and a necessary component of the freedom "to enter the relationship that is the foundation of the family in our society:" marriage. *Zablocki*, 434 U.S. at 386; *see also Obergefell*, 576 U.S. at 667 (recognizing that "the right to marry ... draws meaning from related rights of childrearing, procreation, and education").

Married couples do not sacrifice these fundamental freedoms simply because they are compelled to rely on outside assistance to create their desired families, whether due to medical risk, fertility problems, or biological necessity. Indeed, this Court has affirmed that "'[t]he right to "marry, establish a home and bring up children" is a central part of the liberty protected by the Due Process Clause'" even for those—like same-sex couples—who *must* rely on outside assistance (such as sperm or egg donation) to conceive. *Obergefell*, 576 U.S. at 668 (citations omitted). A married couple's liberty interest in a family that they have together worked to create and raise follows not from genetics, but from the intimacy, independency, and obligations that characterize that relationship. *See, e.g.*, *Lehr*, 463 U.S. at 258 ("[T]he relationship of love and duty in a recognized family

unit is an interest in liberty entitled to constitutional protection."); *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 535 (1925) ("The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.").

Many family relationships encompass genetic connection. But "biological relationships are not [the] exclusive determination of the existence of a family." *Smith*, 431 U.S. at 843. Indeed, "[t]he basic foundation of the family in our society, the marriage relationship, is of course not a matter of blood relation." *Id.* at 844. "[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children," not simply "the fact of blood relationship." *Id.* (alteration in original).

4. The right "to marry, establish a home and bring up children" extends to same-sex couples. *Obergefell*, 576 U.S. at 668 (citation omitted). That right necessarily endows a same-sex married couple with a liberty interest in the care and custody of children born and raised within the marriage.

a. One of the chief justifications identified by this Court for protecting the right of same-sex couples to marry is that it "safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education." *Id.* at 667. As this Court noted, hundreds of thousands of children are presently being raised by same-sex couples. *Id.* at 668. "By giving recognition and legal structure to their parents' relationship," this Court

found that "marriage allows children 'to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.'" *Id.* (quoting *United States v. Windsor*, 570 U.S. 744, 772 (2013)).

This Court also recognized that protecting the right of same-sex couples to marry facilitates "the permanency and stability important to children's best interests." *Id.* (citing Brief for Scholars of the Constitutional Rights of Children as *Amici Curiae* 22-27 ("*Obergefell* Children Scholars Br.")). As the amicus brief to which the Court responded explained, in most jurisdictions, both parties to a heterosexual marriage are presumed to be the legal parents of children born into the marriage. *Obergefell* Children Scholars Br. 22-23. Same-sex marriage bans, however, precluded such presumptions from establishing relationships between children and their non-biological same-sex parents, rendering the children of a same-sex marriage "legal strangers to one of their parents." *Id.* at 23-24. Amici thus warned that "[c]hildren in same-sex families [were being] deprived of the permanency, consistency, and stability inherent in the parent-child relationship." *Id.* at 24.

By protecting the right of same-sex couples to marry, this Court endowed the relationship between same-sex couples and their children with the same stability, permanency, and legal recognition available to married opposite-sex couples and their children. *See Obergefell*, 576 U.S. at 665, 667 ("The four principles and traditions to be discussed"—including the need to "safeguard[] children and families"—demonstrate that the reasons marriage is

fundamental under the Constitution apply with *equal* force to same-sex couples.") (emphasis added).

5. The Idaho Supreme Court's decision is fundamentally incompatible with and threatens to destabilize this Court's Due Process precedents.

a. Consistent with the promise of *Obergefell*, Linsay and Kylee exercised their rights "to marry, establish a home, and bring up children.'" 576 U.S. at 668 (citation omitted). Although Linsay and Kylee agreed that Kylee would carry their child, Linsay was involved at every turn of Kylee's pregnancy. *See* Pet.App.2a. And following P.G.'s birth, Linsay and Kylee together identified Linsay as P.G.'s second mother on a birth certificate worksheet.

Idaho's Department of Health and Welfare confirmed that both Kylee and Linsay are P.G.'s mothers, issuing a birth certificate to that effect. Kylee and Linsay together held themselves out as P.G.'s parents and shared parental responsibilities for their child. Indeed, Linsay cared for and shared in custody of P.G. for P.G's entire life, until Idaho's courts purported to dissolve any connection between them in November 2018.

By electing to marry, conceive a child, and raise that child together within their marriage—the quintessential "protected family unit under the historic practices of our society," *Smith*, 491 U.S. at 124—both Kylee and Linsay acquired a constitutionally-protected liberty interest in the care and custody of their child. *See, e.g.*, *Quilloin*, 434 U.S. at 256 ("[L]egal custody of children is ... a central aspect of the marital relationship ...."); *Obergefell*, 576 U.S. at 670 (listing "child custody, support, and

visitation rules" among the rights, benefits, and responsibilities that follow from marriage).

b. In severing all legal bonds between Linsay and her daughter, Idaho's courts treated "Linsay's marriage to Kylee [as] a nullity," Pet.App.36a (Stegner, J., dissenting), and ignored Linsay's profound and constitutionally protected liberty interest in the care and custody of her daughter. That error infected the decisions of Idaho's courts in two related respects.

i. The Idaho Supreme Court found that Linsay lacked any legal relationship to P.G. because she failed to sign and file a particular form prescribed by Idaho's AIA. In so holding, the Idaho Supreme Court failed to recognize that the interest of married parents in the care and custody of a child they conceive and raise is not state-created. The premise that a parent's constitutionally protected interest in the care and custody of their children originates from filing a form is repugnant to longstanding understandings of the Fourteenth Amendment. "[T]he liberty interest in family privacy" underlying the "freedom to marry and reproduce" has its source "not in state law, but in intrinsic human rights, as they have been understood in 'this Nation's history and tradition." *Smith*, 431 U.S. at 845 (footnote and citation omitted). The court majority's determination that Linsay had no pre-existing "legal" relationship with her child absent compliance with state-imposed, positive-law requirements, Pet.App.22a, was thus deeply flawed.

The relevant question was not whether Linsay complied with every provision of Idaho's Artificial

Insemination Act,[2] but rather whether the State had a sufficiently compelling interest to sever Linsay's liberty interest in P.G.'s care and custody because "neither she nor a physician filed a never-used and now-obsolete form with the State Registrar of Vital Statistics." Pet.App.32a (Stegner, J., dissenting). To ask that question is to answer it.

As Idaho's State Registrar of Vital Statistics has explained, the requirement to file the AIA's consent rule was never enforced and admittedly served no purpose. *See* Pet.App.35a (admitting there has "never been such a filing ... and *no purpose exists* for either the [Bureau of Vital Records] or the [Department of Health and Welfare] to receive the consent forms" (first alteration in original) (emphasis added) (citation omitted)); *see also* Rec. 432 (acknowledging that not one Idaho couple that relied on artificial

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[2] It is exceedingly difficult to understand how the Idaho Supreme Court interpreted the AIA to deprive, rather than confirm, Linsay's parental relationship to P.G. Pursuant to the purportedly gender-neutral interpretation of the AIA adopted by Idaho's Supreme Court, the AIA provided that

> The relationship, rights and obligation between a child born as a result of artificial insemination and the mother's [spouse] shall be the same for *all legal intents and purposes* as if the child had been naturally and legitimately conceived by the mother and the mother's [spouse], if the [spouse] consented to the performance of artificial insemination.

Pet.App.33a-34a (alterations in original) (quoting Idaho Code § 39-5405(3)). Linsay inarguably consented to Kylee's artificial insemination; Linsay, after all, *performed* Kylee's artificial insemination. And Idaho's courts expressly found they agreed to conceive a child by means of artificial insemination. *See* Pet.App.94a; *see also* Pet.App.2a.

insemination filed the consent form over the course of the 2010s); *id.* at 435 (DHW takes no steps to require physicians to file consent forms). Idaho apparently thought so little of the requirement that it repealed it in 2021. *See supra* at 8. Accordingly, Idaho cannot point to a legitimate, let alone compelling, interest in severing Linsay's legal relationship with P.G. because she did not file a never-used consent form.[3]

ii. The Idaho Supreme Court separately held that the magistrate court did not abuse its discretion by finding it was in P.G.'s best interest for Kylee to be awarded sole custody. *See* Pet.App.23a. But the magistrate court's determination was premised on its view that that Linsay and Kylee do not have equal fundamental interests because Kylee is P.G.'s natural parent, and Linsay is not. Pet.App.79a-89a. Because Kylee was P.G.'s biological parent, the magistrate court believed Kylee had a constitutional right to make decisions regarding the care, custody, and control of P.G., and Linsay did not. Pet.App.89a-91a.

That determination ignored that Linsay—like Kylee—has a constitutionally protected interest in the child she planned for, helped to conceive, and raised within her marriage. *See supra* at 13-20. The Idaho Supreme Court's contrary result is incompatible with the "permanency and stability" that *Obergefell* afforded to the relationship between same-sex couples and their children. 576 U.S. at 668.

Left in place, the decision below would deeply undercut the "safeguards [for] children and families"

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[3] Any remaining AIA provisions with which Linsay did not comply, like letting a physician choose the sperm donor, are admittedly only "health and safety" regulations. Pet.App.11a. They offer no basis for stripping Linsay of her parental rights.

that same-sex marriage was intended to ensure. *Id.* at 667. Under the Idaho Supreme Court's holding, the Constitution ascribes same-sex parents different rights and responsibilities with regard to the children they raise—empowering the biological parent to "direct the upbringing and education of [their] children," *Pierce*, 268 U.S. at 534-35, while leaving the non-biological parent's relationship with their child vulnerable, secondary, and subject to dissolution. That treatment, which "delegitimize[s] the non-biological [parent's] efforts to establish [his or] her parental rights and responsibilities" by electing to have a child with their spouse, Pet.App.32a, demeans same-sex marriage and treats as second-class and unequal the relationship of non-biological same-sex parents to their children. That would render *Obergefell*'s promise a mirage. This Court should not allow that result to stand.

B. The Decision Below Conflicts With This Court's Equal Protection Decisions

The Idaho Supreme Court's decision also contradicts this Court's equal protection precedent.

1. *Obergefell* settled that the Equal Protection Clause affords same-sex couples the same fundamental right as opposite-sex couples to marry and to enjoy the benefits of marriage. 576 U.S. at 668. This includes not only the right to marry, but also the right to "establish a home and bring up children" within that marriage, and enjoy the same "constellation of benefits that the States have linked to marriage." *Id.* at 668, 671 (citation omitted).

This Court reaffirmed those principles in *Pavan v. Smith*, 137 S. Ct. 2075 (2017). In *Pavan*, this Court echoed that "a State may not 'exclude same-sex

couples from civil marriage on the same terms and conditions as opposite-sex couples.'" 137 S. Ct. at 2078. Accordingly, this Court found that an Arkansas law violated the Equal Protection Clause by permitting a married woman and her husband to be listed as a child's parents on an Arkansas birth certificate even "where the couple conceived by means of artificial insemination with the help of an anonymous sperm donor," but did not afford the same opportunity to a married woman and her *wife*. *Id.* at 2076-79.

2. Idaho's AIA treats opposite-sex and same-sex couples differently. The Act provides that "[t]he relationship, rights, and obligation between a child born as a result of artificial insemination *and the mother's husband* shall be the same ... as if the child had been naturally and legitimately conceived by the *mother and the mother's husband, if the husband consented to the performance of artificial insemination.*" Pet.App.10a (emphasis altered) (quoting Idaho Code § 39-5405(3)). By its terms, therefore, the AIA provides no path for married same-sex couples who rely on artificial insemination to obtain parental rights. *See* Pet.App.11a.

The Idaho Supreme Court tried to solve that problem by construing the AIA in a purportedly "gender-neutral manner"—replacing "'husband' in the AIA [with] the gender-neutral term 'spouse.'" Pet.App.11a-12a. Following that change, the court believed that there was "no equal protection concern" because it believed that "the AIA would apply to opposite-sex couples and same-sex couples in the exact same manner." Pet.App.11a.

3. Even as rewritten by Idaho's Supreme Court, however, the AIA does not afford same-sex couples the

right to acquire parental rights "on the same terms and conditions as opposite-sex couples." *Pavan*, 137 S. Ct. at 2078 (citation omitted).

a. First, the AIA prevents half of same-sex couples (those with two men) from obtaining parental rights via artificial insemination *at all*.

When married, male same-sex couples seek to conceive, they often use artificial insemination to fertilize a third party's egg of a third party. *See, e.g.*, Wendy Norton et al., *Gay Men Seeking Surrogacy to Achieve Parenthood*, 27 Reproductive BioMedicine Online 271, 273 (2013) ("[F]ertilization is usually achieved by artificial insemination undertaken informally between the parties or by intrauterine insemination ...."). But the AIA provides no pathway for a same-sex male couple to obtain parental rights from such a procedure. Rather, the AIA *terminates* the parental rights of the "Donor," defined as "a man who is not the husband of the woman upon whom the artificial insemination is performed." Idaho Code § 39-5401(2). Those parental rights are instead vested in the "mother's husband." *Id.* § 39-5405(3). The AIA thus enables a non-biological father in an opposite-sex marriage to obtain parental rights, but not the non-biological father in a same-sex marriage. That unequal treatment is incompatible with *Obergefell* and *Pavan*.

b. Second, the AIA imposes a host of onerous and intrusive burdens on married same-sex couples that opposite-sex couples generally need not bear.

As interpreted by Idaho's Supreme Court, a married couple cannot obtain "parental rights" to a child conceived with artificial insemination unless they "comply with *all* requirements of the [AIA]."

Pet.App.15a (emphasis added). Those burdensome requirements uniquely burden same-sex couples.

To begin with, the AIA provides that "[o]nly *physicians* ... and persons under their supervision may select artificial insemination donors and perform artificial insemination. Pet.App.11a (alteration in original) (emphasis added) (quoting Idaho Code § 39-5402). Under Idaho law, therefore, a married same-sex female couple cannot choose the biological father of their child, nor conceive in the privacy of their home. Should they choose otherwise, they face not only the loss of parental rights, but a misdemeanor charge. Idaho Code § 39-5407. By contrast, the State does not require opposite-sex couples to seek a doctor's approval before procreating, nor require a physician's presence at conception on pain of criminal penalty or the loss of parental rights.

The AIA's burdens meaningfully intrude on a same-sex couple's autonomy and privacy. They prevent a married same-sex couple from selecting the biological parent of their child, penalize them for conceiving in the privacy of their home, and force them to use a physician to grow their family. The latter requirement not only invades a couple's right to privacy, but imposes a burden that could be prohibitively expensive for many same-sex couples and leave them unable to become parents.

It is no answer that some infinitesimal minority of opposite-sex couples might use donor insemination and therefore theoretically fall within the AIA's ambit.[4] Even "a law nondiscriminatory on its face

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[4] Although estimates vary, the total numbers of married opposite-sex couples who rely on donor insemination (as opposed to assisted reproductive technology using the husband's sperm)

may be grossly discriminatory in its operation." *M.L.B.*, 519 U.S. at 126-27 (quoting *Griffin v. Illinois*, 351 U.S. 12, 17 n.11 (1956)). This law, moreover, *is* admittedly discriminatory on its face. *See* Pet.App.11a. Regardless, a law that meaningfully intrudes on and burdens the intimate and private choices of *all* same-sex couples cannot be saved because it theoretically could impact under 0.5% of opposite-sex couples.

c. Third, although the AIA took effect in 1982, there is no evidence that Idaho has *ever* applied the Act to strip parental rights from a non-biological male parent whose wife obtained artificial insemination.

4. *Obergefell* held that same-sex couples are entitled to enjoy the right to marry, establish a home, and raise children on the same terms and conditions as opposite-sex couples. *Pavan*, 137 S. Ct. at 2076. Among the "'rights, benefits, and responsibilities' to which same-sex couples, no less than opposite-sex couples, must have access," *id.* at 2078, are "child custody, support, and visitation rules," *Obergefell*, 576 U.S. at 670. By placing differential burdens on same-sex couples from opposite-sex couples, the Idaho

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is small. A 2019 NIH study found that of 5,554 female participants in 2015-2017 who were either 18+ years old *or* had ever had intercourse with a man, only 20 (or less than 0.4%) had received artificial insemination from a non-husband/partner donor. Rachel Arocho et al., *Estimates of Donated Sperm Use in the United States: National Survey of Family Growth 1995–2017*, 112 *Fertility & Sterility* 718, at Supplementary Materials (Table 3) (2019), https://www.fertstert.org/article/S0015-0282(19)30492-3/fulltext/. And because many women who utilize donor insemination are unmarried, *see id.* at 721 (Table 2), it is likely that only a fraction of the 20 were married.

Supreme Court's decision is incompatible with those principles.

II. The Result Below Conflicts With The Results Reached By Numerous Other State Courts

The Idaho Supreme Court's decision also conflicts with the decisions of numerous other state courts, which have repeatedly recognized that *both* members of a same-sex couple share rights and responsibilities with respect to children born within a marriage (or pre-*Obergefell*, a domestic partnership). Although different state courts have reached that conclusion by a number of different paths, their results conflict with the decision below. That conflict further warrants this Court's intervention.

1. Even prior to *Obergefell*, several state courts found that both members of a same-sex couple who together decide to start a family and raise a child together during a committed relationship stand in "legal parity" with each other and *each* have rights protected by the Due Process Clause of the Fourteenth Amendment.

In 2005, the Supreme Court of Washington recognized that a biological mother's former domestic partner stood as a de facto parent to their child because the natural parent had consented to and fostered her parent-like relationship, the non-biological parent and child lived together in the same household, and the non-biological parent "fully and completely [undertook] a permanent, unequivocal, committed, and responsible parental role in the child's life." *In re Parentage of L.B.*, 122 P.3d 161, 177 (Wash. 2005). Accordingly, the Washington Supreme Court found that even after the couple's relationship ended, "*both* [the biological and non-biological parent]

have a 'fundamental liberty interest[]' in the 'care, custody, and control' of [their] child." *Id.* at 178 (alteration in original) (citation omitted). Delaware's Supreme Court reached a similar result in *Smith v. Guest*, holding that a de facto non-biological parent would have "a co-equal 'fundamental parental interest' in raising" a child that was a product of the relationship. 16 A.3d 920, 931 (Del. 2011).[5]

The Florida Supreme Court reached a similar result in *D.M.T. v. T.M.H.*, 129 So. 3d 320 (Fla. 2013). In that case, "two women ... in a long-term committed relationship ... agreed to jointly conceive and raise a child together as equal parental partners." *Id.* at 327. One woman (T.M.H.) supplied the egg, while the other (D.M.T.) carried the child. *Id.* The Court found that *both* D.M.T. and T.M.H.'s parental rights were deserving of constitutional protection—even though only one mother shared a biological relationship with the child. *Id.* at 328. In so holding, the court noted that it was "not the biological relationship per se, but rather 'the assumption of parental responsibilities which is of constitutional significance.'" *Id.* (citation omitted). And it agreed with the lower court that there was "no legally valid reason to deprive either woman of parental rights" where they "'were in a committed relationship for many years and both decided and agreed to have a child born out of that relationship to love and raise as their own and to

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[5] *Guest* involved an adopted child. Because the couple adopted from a country that did not permit two women to adopt, only one of the couple became the child's legal parent. The couple split roughly fourteen months after the adoption. *See Smith v. Gordon*, 968 A.2d 1, 2 (Del. 2009).

share parental rights and responsibilities in rearing that child.'" *Id.* at 339 (citation omitted).

2. Other states have used various alternative routes to find that non-biological same-sex parents share protected parental rights to a child conceived and raised together during their long-term relationship.

a. Some states have found parents in Linsay's position to be "psychological parents" that stand in legal parity to a biological parent. In *Rosemarie P. v. Kelly B.*, the Alaska Supreme Court held that a non-biological parent was entitled to joint custody of a child produced via artificial insemination during a same-sex couple's 14 year domestic partnership. No. S-17960, 2021 WL 4697719, at *4 (Alaska Oct. 8, 2021). The court found that the non-biological parent met the standard of a "psychological parent" because she had "'on a day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfill[ed] the child's psychological need for an adult," and "bec[ame] an essential focus of the child's life, [being] not only the source of the fulfillment of the child's physical needs, but also the source of ... emotional and psychological needs.'" *Id.* (final two alterations in original) (citation omitted).

Similarly, in *V.C. v. M.J.B.*, New Jersey's Supreme Court acknowledged that a psychological parent relationship existed between a woman and twins born to her former domestic partner through artificial insemination during their relationship. 748 A.2d 539, 555 (N.J.), *cert. denied*, 531 U.S. 926 (2000). As a result, the court rejected claims that joint custody violated the biological parent's due process interests, instead concluding that the psychological parent "stands in parity with the legal parent." *Id.* at 227.

b. Other state courts have found that parental rights should be shared when (as here) a biological parent consents to their partner co-parenting a child born inside a committed same-sex relationship. *See, e.g.*, *Mullins v. Picklesimer*, 317 S.W.3d 569, 576, 578-79 (Ky. 2010) (biological mother "waived her superior right to custody" when she agreed to conceive and co-parent child with her partner, and the parties held themselves out as the child's parents); *Eldredge v. Taylor*, 339 P.3d 888, 895 (Okla. 2014) (legally protected relationship arose when "a mother entered into a civil union with her long-time partner; purposefully engaged in family planning ... with the intent of sharing the rights and responsibilities of parenthood with her partner; committed this intent to writing; and, for years, reaffirmed this intent by accepting financial and emotional support from her partner and actively nurturing the relationship between her partner and the children"); *Kulstad v. Maniaci*, 220 P.3d 595, 607-08 (Mont. 2009) ("[Biological mother] 'consented to and fostered the parent-like relationship between [her former domestic partner] and the children.'" (citation omitted); *In re Parentage of M.F.*, 475 P.3d 642, 659 (Kan. 2020) (holding that same-sex partner entitled to parental rights where the biological mother "'notoriously ... recognize[d]' her maternity" (alterations in original)); *Boseman v. Jarrell*, 704 S.E.2d 494, 496 (N.C. 2010) ("[B]y intentionally creating a family unit in which [biological mother] permanently shared parental responsibilities with [former partner], ... [biological mother] acted inconsistently with her paramount parental status"; *Brooke S.B. v. Elizabeth A.C.C.*, 61 N.E.3d 488, 500 (N.Y. 2016) (holding a "pre-conception agreement to

conceive and raise a child as co-parents" could establish the parental rights of a non-biological parent within committed same-sex couple).

3. Although they have reached their results through a variety of tracks, numerous other state courts have therefore found that when a same-sex couple together establishes a family and raises their children together, the non-biological parent has a protected parental relationship with that child.

In contrast with those decisions, Idaho treated Linsay's relationship with her spouse and their child as a "nullity and eviscerate[d] the legal protections for their child that would otherwise inhere to the family unit." Pet.App.36a (Stegner, J., dissenting).

III. The Question Presented Is Exceptionally Important And Warrants Review

The decision below threatens a core premise of *Obergefell*, and would impose insecurity, instability, and intolerable harm on same-sex families. The question presented is of paramount importance to hundreds of thousands of LGBT Americans and their children. This Court's intervention is warranted.

1. In *Obergefell*, this Court recognized that all Americans, regardless of sexual orientation, enjoy a "right to marry, establish a home and bring up children." 576 U.S. at 665. A central premise of that holding was that recognition of same-sex marriage would "safeguard children and families" and "afford[] the permanency and stability important to children's best interests." *Id.* (citation omitted).

The Idaho Supreme Court's decision undermines and destabilizes those vital guarantees for same-sex couples and their children. It denies same-sex married couples the right to share in the care and

custody of their child—rendering the non-biological parent's relationship secondary, lesser, insecure, and impermanent. That demeans same-sex marriage and treats as "lesser," *id.* at 668, and once again renders the children of a same-sex marriage "legal strangers to one of their parents." *Obergefell* Children Scholars Br. 23-24. It deprives same-sex couples of access to marriage on the same terms generally enjoyed by opposite-sex couples. And it threatens to sever the bonds between parents and children they plan for and raise from birth—imposing significant harm on both parent and child. Those results not only are incompatible with *Obergefell*, and disregard the "historical respect ... accorded to the relationships that develop within the [marital] family" *Michael H.*, 491 U.S. at 123 & n.3, but they will expose hundreds of thousands of same-sex families to instability, de-recognition, fear, and injury. This Court's intervention is needed to prevent those results.

2. Review is also warranted to prevent a panoply of harms that will follow from the decision below.

First, as Justice Stegner points out, the Idaho Supreme Court's decision has the effect of rendering "all children born by artificial insemination in Idaho ... presumptively illegitimate"—destabilizing families and precipitating "profound implications" for issues of "citizenship, inheritance, intestate succession ... [and] child custody" for many. Pet.App.35a-36a (Stegner, J., dissenting).

Second, by holding that non-biological parents lack any rights to their children, the decision below necessarily also severs their "obligations and responsibility to the child." *Id.* The upshot will be to deprive children of broken same-sex marriages of personal and financial support from one of their

parents—thereby imposing further harm on the child and the surviving custodial parent. *See* Pet.App.46a (noting the decision will be used "to resist child support payments").

Finally, the decision carries dangerous consequences for the victims of domestic violence. When Linsay was the victim of Kylee's battery, Linsay made the courageous decision to leave her marriage. But under the decision below, that choice cost her the right to care for—or even see—her daughter. The decision below thus subjects a non-biological parent in an abusive same-sex marriage to an intolerable choice: stay in an abusive relationship, or end the relationship and risk dissolution of all legal bonds with your child. No parent—same-sex or otherwise—should be put to that terrible choice.

The Court's intervention is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

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