No. 21-1212

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 Writ of Certiorari to the Supreme Court of Idaho

BRIEF IN OPPOSITION

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QUESTION PRESENTED

When a woman conceives by artificial insemination using third-party donor sperm, does the United States Constitution compel the State of Idaho to recognize the woman's spouse as a parent, despite the parties' failure to comply with the Idaho statute that provides for parental rights in cases of artificial insemination?

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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RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

Respondent respectfully requests that this Court deny the petition for a writ of certiorari.

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 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. Petitioner timely filed a petition for a writ of certiorari on February 7, 2022, which was docketed on March 7, 2022. This Court has jurisdiction under 28 U.S.C. 1257(a).

INTRODUCTION

This case presents a question of vital interest to the parties, the State of Idaho and those Idaho residents who may need to use artificial insemination to conceive a child. In 1982, Idaho enacted its Artificial Insemination Act ("AIA") to provide a path to confirm the legal parental status of the non-biological spouse to a woman who undergoes artificial insemination. Kylee and Linsay, a same-sex married couple, conceived a child through artificial insemination without complying

with the AIA. The court below applied the AIA in a sexual-orientation-neutral, gender-neutral fashion. Pet. App. 11a. The court below affirmed the ruling of the district court 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 went on to affirm, based upon a best-interests-of-the-child analysis under Idaho law, that it was not in the child's best interest for Linsay to have custody or visitation, and Kylee was awarded sole custody. Pet. App. 23a.

Contrary to Petitioner's argument, the decision below does not conflict with this Court's equal protection or due process rulings, nor does it conflict with the state court decisions Petitioner cites. The decision construes an Idaho statute in a gender-neutral, sexual-orientation-neutral manner and makes clear that the statute applies equally to same-sex and opposite-sex couples.

STATEMENT OF THE CASE

A. Factual Background

Kylee and Linsay were married on June 23, 2015. Pet. App. 60a. Both of them had previously been married, and Linsay was a mother to two children. The magistrate court found that, "The parties' marriage hinged on Kylee having a child of her own." Pet. App. 60a-61a.

The couple did not seek the aid of a physician to become pregnant but instead enlisted the help of a friend, TW, who agreed to donate sperm. Pet. App. 61a. Kylee, Linsay and TW entered into an agreement that

Linsay found online (the "Sperm Donor Agreement"). Pet. App. 2a. Under the Sperm Donor Agreement, TW agreed to donate his sperm for the purpose of artificial insemination and agreed not to pursue his right to establish paternity or seek guardianship, custody, or visitation of any resulting child. *Id*. The Sperm Donor Agreement does not specify whether Kylee or Linsay is to be inseminated, nor does it contain language by which either Kylee or Linsay "requests" or "consents" that she be artificially inseminated. Pet. App. 14a. The Sperm Donor Agreement does not contain language by which either Kylee or Linsay accepts the rights and responsibilities of parenthood of any child produced by artificial insemination. *Id*. Petitioner's assertions to the contrary at Pet. 3 are inaccurate. Rec. 125-127.[1]

Kylee was inseminated with TW's sperm using syringes, a cup and other medical supplies purchased online. Pet. App. 61a. The insemination was eventually successful, and Kylee gave birth to the child on October 29, 2016. *Id*. Both Kylee and Linsay were identified as mothers on the child's birth certificate. Pet. App. 62a. From her birth until July 3, 2017, Kylee was the child's primary caregiver. *Id*.

On July 3, 2017, at a time when both had been consuming alcohol, Kylee and Linsay had a fight. Pet. App. 68a. Kylee attempted to hug Linsay and was pushed away, following which a pushing match ensued. Kylee pushed Linsay out of bed and Linsay punched Kylee in the nose, breaking it. Pet. App. 68a-69a.

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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).

Linsay called the police, who arrested Kylee. *Id*. Attempting to quickly accept responsibility and return to being the child's primary caregiver, Kylee accepted a plea bargain and pled guilty to misdemeanor domestic violence. *Id*. Kylee was placed on probation and granted a withheld judgment. Pet. App. 69a. The court issued a no-contact order preventing Kylee from contact with the child. The no-contact order was in effect from July 3, 2017 until December 27, 2017, and during this time Linsay was the child's primary caregiver. Pet. App. 63a. While Linsay was the child's primary caregiver, she placed her needs before the child's, including by leaving the child overnight with a caregiver for 31 nights. Pet. App. 64a.

Linsay filed for divorce on August 29, 2017 (Pet. App. 69a) and the case was heard at a three-day trial in July and August of 2018. Pet. App. 59a. The trial court issued Findings of Fact and Conclusions of Law on November 15, 2018. Pet. App. 59a. An Amended Judgment and Decree of Divorce was entered on November 19, 2018. Pet. App. 93a.

B. Proceedings Below

1. Trial Court

At trial, the magistrate determined that under Idaho's common-law marital presumption, a rebuttable presumption existed that Linsay was the child's parent due to Linsay being married to Kylee when the child was born. Pet. App. 78a. The magistrate also found that the presumption had been rebutted by clear and convincing evidence that Kylee and TW were the child's biological parents. Pet. App. 79a. Thus, Linsay was not

the child's parent by means of the marital presumption. *Id*.

The magistrate also held that Linsay had not pursued the other avenues available to her to become the child's legal parent:

> Linsay did not sign or properly file a voluntary acknowledgment of paternity affidavit pursuant to Idaho Code § 7-1106. Had Linsay done so, she would have been declared a legal parent. Linsay did not adopt [the child] pursuant to Idaho Code § 16-1501 et seq. Had Linsay done so, she would have been a legal parent. Linsay did not comply with the Artificial Insemination Act and cannot receive the benefit. Linsay did not sign or file a consent form pursuant to Idaho Code § 39-5403. Had Linsay done so, she would have been a legal parent. Linsay does not get the benefit of the law that she did not invoke and follow. Pet. App. 79a.

Although the magistrate held that there was no statutory authority granting Linsay permission to seek custody of or visitation with the child, the magistrate then applied Idaho Supreme Court precedents that recognize situations where custody of a child may be awarded to a person not related to the child by blood or existing marriage. Pet. App. 79a-80a; *see Stockwell v. Stockwell,* 116 Idaho 297, 775 P.2d 611 (Idaho 1989). The magistrate held that under *Stockwell* and its progeny, Linsay could not meet the standard to seek custody of the child because she could not prove, by clear and convincing evidence, that Linsay had custody

of the child for an "appreciable period of time." Pet. App. 79a-88a.

Despite holding that Linsay lacked standing under *Stockwell* to seek custody of the child, the magistrate went on to analyze Linsay's rights to custody and visitation assuming, for the sake of argument, that Linsay did have standing. Pet. App. 88a-91a. In this analysis, the magistrate applied the court's discretion in awarding custody of minor children and the "best interests of the child" standard, including the factors set out in Idaho Code § 32-717. *Id.* The magistrate concluded that Linsay had not proven by clear and convincing evidence that it was in the child's best interest to have visitation with Linsay. Pet. App. 91a. The court noted among other factors the toxic and unhealthy relationship between Kylee and Linsay, which would subject the child to ongoing conflict and suffering. Pet. App. 90a. The court granted Kylee sole legal and physical custody of the child. Pet. App. 91a.

2. District Court

The district court upheld the magistrate court's determination that the marital presumption applied but had been rebutted by clear and convincing evidence. Pet. App. 101a-103a. The district court also upheld the magistrate's determination that Linsay had not proved parentage by (i) adopting, (ii) signing and filing a voluntary affidavit of paternity pursuant to Idaho's Paternity Act or (iii) complying with the AIA. Pet. App. 104a-108a. Linsay had argued that she was unable to comply with the Paternity Act or the AIA because those statutes use gendered terms such as "father" and "husband" which do not apply to her. Pet.

App. 104a, 107a. The district court rejected this interpretation, noting that Idaho Code § 73-114(1)(b) provides where, as in the Paternity Act and AIA, terms such as "husband" are not defined, a gender-neutral use is implied ("Words used in the masculine gender, include the feminine and neuter[.]") *Id.* This interpretation, the district court found, affords same-sex couples the same rights as opposite-sex couples. Pet. App. 107a.

The district court also upheld the magistrate's conclusion that Linsay had not complied with the AIA because the artificial insemination was not performed by a physician, as required by the statute to ensure the health of the prospective child and mother. Pet. App. 106a. Nor did Linsay sign or file a "prior written request and consent" as required by the statute. Pet. App. 105a. The district court found that, had Linsay "sought the protections of the act it is certain in this [c]ourt's analysis and inherent in the magistrate's decision that she would have been entitled to the statutory benefits, regardless of the reference to 'husband.' A gender neutral analysis would be applicable." Pet. App. 107a. Accordingly, Linsay's failure to pursue the process outlined in the AIA precluded her from reaping the benefits provided by the act. *Id*.

With respect to the third-party standing analysis under *Stockwell*, the district court held that the magistrate did not abuse her discretion by determining that the amount of time Linsay had spent as the child's primary caregiver did not constitute an "appreciable period of time" sufficient to satisfy *Stockwell*. Pet. App.

115a. Even if the magistrate had abused her discretion by not finding standing under *Stockwell*, any error had been cured because the magistrate went on to apply the best-interests-of-the-child analysis that would have been required under *Stockwell*. Pet. App. 115a-116a. And the district court refused to disturb the best-interests-of-the-child analysis conducted by the magistrate in her discretion. Pet. App. 129a-130a. In conclusion, the district court found:

> The decisions of the magistrate were not based on a differential treatment of same sex marriages from heterosexual marriages. The appellant has shown no application of the law to the same sex marriage and custody determination than would be applicable in heterosexual marriage. She had the same avenues to pursue and obtain parental rights as a non-biological related male spouse. No abuse of discretion has been shown. Pet. App. 134a.

3. Idaho Supreme Court

The four-justice majority of the court below first ruled that the common-law marital presumption and the Idaho Paternity Act were inapplicable to the case. Pet. App. 9a. Because the AIA was enacted after the decision in *Alber v. Alber,* 472 P.3d 321 (Idaho 1970) (which established that the common-law marital presumption is rebuttable) and after the adoption of the Idaho Paternity Act, and because the AIA was enacted to address issues specific to artificial insemination, the court below held that the AIA and the AIA alone controlled the resolution of the case. Pet. App. 8a-9a.

The court affirmed the district court's reliance on Idaho Code § 73-114(1)(b) to interpret the AIA in a gender-neutral manner and found that, as thereby interpreted, the AIA was applicable and available to Linsay to secure parental rights over the child. Pet. App. 11a-12a. However, the court upheld the lower courts' findings that Linsay did not comply with the AIA because (i) she did not sign a written request and consent as contemplated by the AIA, (ii) a licensed physician did not perform the artificial insemination and sign the written request and consent and (iii) the written request and consent was not filed with the state registrar of vital statistics. Pet. App. 12a-15a. Using longstanding principles of statutory construction, the court declined to read section 39-5405(3) of the AIA in isolation, as Linsay urged, and ruled instead that all provisions of the statute must be complied with in order to receive its benefit. Pet. App. 16a-19a. The court found that the record fully supported the lower courts' conclusion that Linsay had not complied with the AIA and thus was not entitled to legal parenthood pursuant to its provisions. Pet. App. 16a-22a.

The court did not address whether Linsay had third-party standing to seek custody under *Stockwell*, agreeing with the district court that any error in the standing analysis was cured because the magistrate fully addressed whether giving Linsay custody would be in the best interests of the child. Pet. App. 23a-30a. The court affirmed the lower courts' ruling that giving Linsay custody would not be in the best interests of the child. Pet. App. 30a.

One of the five justices of the court dissented, arguing that section 39-3405(3) of the AIA could be read in isolation from the rest of the statute to grant Linsay parental rights. Pet. App. 32a-37a. The dissenting justice further argued that Linsay's actions and intentions sufficed to evidence the written request and consent required by the AIA, ignoring section 39-5403(1) of the act. Pet. App. 37a-41a. To the dissenting justice, Idaho public policy favoring legitimacy and support for the family unit should have trumped a strict reading of the AIA and insistence on compliance with all of the AIA's terms. Pet. App. 37a. The dissenting justice also believed that the majority failed to consider the consequences of its decision, which he argued would jeopardize legal protections for people whose spouses undergo artificial insemination. Pet. App. 32a.

C. Idaho's Common Law and Statutory Scheme for Determining a Child's Parents

1. Petitioner lists Idaho Code § 39-255(e)(1), regarding birth certificates, as part of Idaho's statutory scheme for recognizing a child's parents. Pet. 5. This is inaccurate and misleading. This statute does not confer legal parental status; it simply governs records of events and information concerning those events which have been reported. This statute is part of the Idaho Vital Statistics Act, which is a comprehensive system by which the state tracks vital statistics such as deaths, births, marriages, divorces, annulments, adoptions, abortions and stillbirths. The act governs the events to be tracked, the information to be obtained, and the forms, rules and procedures to be

utilized. The act also prescribes forms, rules and procedures for altering the information contained in the vital records. While the act provides that any certificate or copy of vital records certified by the state registrar is prima facie evidence of the facts recited in the certificate (Idaho Code § 39-274), it is evidence which can be overcome by proof of contrary facts.

2. Idaho's common law has long presumed that a child conceived during marriage is the child of the birth mother and her spouse. *Alber,* 472 P.3d 321 at 324 (Idaho 1970). That presumption is rebuttable and may be overcome by clear and convincing evidence. *Id.* at 326-370.

3. Idaho law also provides an avenue to legal parenthood through compliance with the Idaho Paternity Act or adoption. Idaho Code §§ 7-1101-7-1126; Idaho Code §§ 16-1501-16-1515.

4. In 1982, Idaho enacted the AIA to govern the process of a married couple conceiving a child through artificial insemination. Idaho Code §§ 39-5401-39-5408; Pet. App. 51a-53a. Prior to the adoption of the AIA, no laws, statutes or rules governed the process of artificial insemination in Idaho. The AIA is a comprehensive act designed to advance substantial and important state interests surrounding the process of artificial insemination. The AIA is applicable to all persons conceived as a result of artificial insemination on or after the effective date of the act (Idaho Code § 39-5406); provides only physicians or persons under their supervision may select semen donors or perform artificial insemination (Idaho Code § 39-5402); prohibits donation of semen by a person who has a

disease or defect transmissible by genes or who knows he has a venereal disease (Idaho Code § 39-5404); requires that semen donation facilities use all reasonable means to detect if a donor has an antibody of HTLV-III in his blood, and prohibits the use of such donors for artificial insemination (Idaho Code § 39-5408); and requires that no artificial insemination be performed on a woman without her prior written consent and the prior written consent of her husband, and that such consents be filed with the State Registrar of Vital Statistics by the physician who performs the insemination (Idaho Code § 39-5403). If the requirements of the AIA are fulfilled: (i) the donor has no right, obligation or interest with respect to the child born through artificial insemination; (ii) the child has no right, obligation or interest with respect to the donor; and (iii) the relationship, rights and obligation between the child and the mother's husband are the same for all legal intents and purposes as if the child had been naturally and legitimately conceived, if the husband consented to the performance of artificial insemination. (Idaho Code § 39-5405); Pet App. 51a-53a.

At the time the AIA was enacted, same-sex marriage was not legal in Idaho. Marriage as it then existed was only between a man and a woman, so the AIA uses the terms "husband" and "wife." Same-sex marriage became legal in Idaho when the Ninth Circuit announced its decision in *Latta v. Otter,* 771 F.3d 456 (9th Cir. 2014). The Idaho legislature has not specifically updated its Family Law Code, but it has otherwise addressed gendered language in Idaho statutes. Idaho Code § 73-114 is a general provision of

Idaho law which relates to the construction of statutes. It provides: "Unless otherwise defined for purposes of a specific statute: (b) Words used in the masculine gender, include the feminine and neuter;" Pet. App. 11a. The term "husband" is not defined in the AIA, and the court below found that the use and application of § 73-114(1)(b), as intended by the Idaho legislature, permits the AIA to be read and applied in a gender-neutral, sexual-orientation-neutral fashion. Pet. App. 11a-12a.

REASONS FOR DENYING THE PETITION

A. The Idaho Supreme Court's Decision Correctly Interprets Applicable Law

1. The court below correctly determined that the AIA is the controlling statute in this case, recognizing that "the legislature clearly has the power to abolish or modify common law rights and remedies." *Olsen v. J.A. Freeman Co.,*791 P.2d 1285, 1296 (Idaho 1990) (citing *Jones v. State Bd of Medicine,* 555 P.2d 399 (Idaho 1976). Where two statutes conflict, courts should apply the more recent and more specifically applicable statute. *Eller v. Idaho State Police,* 443 P.3d 161, 168 (Idaho 2019) (citing *Valiant Idaho, LLC v. JV L.L.C.,* 429 P.3d 168, 177 (Idaho 2018); Pet. App. 8a-9a.

2. The court below recognized that this Court's decision in *Obergefell v. Hodges,* 576 U.S. 644 (2015), requires the AIA to be read in a gender-neutral manner and to apply equally to opposite-sex couples and same-sex couples. Pet. App. 11a. The court also recognized that statutes must be interpreted in a manner that upholds their constitutionality whenever possible.

Leavitt v. Craven, 302 P.3d 1, 5 (Idaho 2012); *id*. The court below correctly applied the provisions of Idaho Code § 73-114(1)(b) to read the AIA in a gender-neutral manner. *Id*.

3. The court below correctly applied standard rules of statutory interpretation and construction. The court applied the doctrine of *in pari materia*, requiring the AIA to be read and construed as one system, with the objective of giving effect to the intent of the legislature. *Gomez v. Crookham Co.,* 457 P.3d 901, 906 (Idaho 2020); Pet. App. 16a-17a. The court read the provisions of the AIA not in isolation but considered in context and as a whole. Pet. App. 16a. The court gave effect to all the words and provisions of the AIA so that none were void, superfluous or redundant. *Id*. The court recognized that, "The public policy of legislative enactments cannot be questioned by the courts and avoided simply because the courts might not agree with the public policy so announced." *Verska v. Saint Alphonsus Reg'l Med. Ctr.,* 265 P.3d 502, 509 (Idaho 2011); Pet. App. 19a.

4. Based on the evidence presented in the case, and applying the provisions of the AIA, the court below concluded that Linsay had not complied with the requirements of the AIA and thus could not obtain the benefit of legal parenthood provided by the statute. Pet. App. 15a. The semen donor was not selected and the artificial insemination was not performed by a physician, as required by Idaho Code § 39-5402. *Id*. The semen donor was not questioned about diseases or genetic defects, nor about whether he had or might have a venereal disease, as required by Idaho Code

§ 39-5404. Pet. App.18a. The donor's blood was not checked for HTLV-III antibodies, as required by Idaho Code § 39-5408. *Id*. Neither Linsay, Kylee nor a physician signed a written request and consent, and no request and consent was filed. Pet. App. 13a-18a.

B. The Idaho Supreme Court's Decision Does Not Conflict with this Court's Equal Protection Decisions

1. The Idaho Supreme Court's decision in this case does not conflict with this Court's holdings in *Obergefell v. Hodges,* 576 U.S. 644 (2015), and *Pavan v. Smith,* 137 S. Ct. 2075 (2017). Unlike in *Pavan*, the couple in this case applied for and received a birth certificate listing each of them as the child's "mother." However, the legal significance of the birth certificate is limited, as explained above; it does not constitute conclusive evidence of legal parenthood in an Idaho court. The court below acknowledged that *Obergefell* required it to read the AIA in a gender-neutral manner. Pet. App. 11a. It applied Idaho Code § 73-114(1)(b) to do so, and found there was no equal protection concern because the AIA applied to opposite-sex couples and same-sex couples in the exact same manner. *Id*.

2. Petitioner argues that she has had burdens generally inapplicable to opposite-sex couples placed on her. Pet. 2. For example, she argues that "married, opposite-sex couples are not generally required to allow physicians to select biological fathers of their children." Pet. 11. Of course, the AIA does not apply to opposite-sex couples who do not use artificial insemination. It applies no burdens to such couples and affords them no benefits. But the plain language of the AIA and the

opinion of the court below make clear that a married, opposite-sex couple is required to comply with the provisions of section 39-5402 concerning donor selection and physician performance of artificial insemination, along with all of the other requirements of the AIA, in order for the husband to obtain the result provided in section 39-5405(3). In fact, when it was enacted in 1982, the AIA could *only* have applied to opposite-sex couples because same-sex marriage was not then recognized.

Petitioner has failed to adduce evidence of any married opposite-sex couple where the father was determined to be a legal parent of a child conceived by artificial insemination using donor sperm when that couple had not complied with the AIA. This is Petitioner's burden in an equal protection challenge and she has failed to meet it. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). She has also not established evidence of discriminatory intent, as the trial court, the district court and the court below all agreed that the AIA must be applied similarly to same-sex and opposite-sex couples. Pet. App. 11a, 99a.

3. Petitioner's argument that the AIA "prevents half of the same sex-couples (those with two men) from obtaining parental rights via artificial insemination" (Pet. 26) is irrelevant, since Linsay was not in a same-sex male relationship. While a male same-sex couple has the ingredient which is typically donated in an artificial insemination—the semen—they lack an egg and a uterus. What they require is gestational surrogacy, which is a reproductive procedure not governed or covered by the AIA.

4. Petitioner's argument at Part 3 at Pet. 15-18 misses the point. As the court below held, the AIA was enacted by the legislature to provide stability, certainty and defined relationships and consequences among the participants in the artificial insemination process. If the statutory scheme is properly followed, the donor and resulting child have no legal rights or obligations between them, and the spouse is determined to be the legal parent of the child. The AIA was also designed to avoid the transmission of acquired immunodeficiency disease and to ensure that semen donors do not have venereal or other diseases or genetically transmitted defects. It was designed to ensure that a medical procedure is performed only by qualified persons in a safe manner. The legislative purpose was to expand and solidify parental rights in a previously uncertain area, not to strip away the rights of anyone seeking to conceive a child by artificial insemination. The price of those benefits is compliance with the requirements of the AIA.

5. Petitioner argues that this Court's review is warranted based upon the statements made by one justice in dissent. Pet. 34-35. But the dissent's comments were not shared by the four-member majority of the court below, all of whom joined in the opinion. The dissent's analysis and predictions of the consequences of this decision may prove to be inaccurate. And the dire consequences predicted by the dissenting justice only occur when parties to an artificial insemination do not follow the provisions of the AIA. After 42 years, this is the first and only case to reach the court below on that issue. The point made by the majority is this: It is the province of the

legislature to make law, and it is the province of the court to interpret and apply the law as written.

6. Petitioner's argument that review is appropriate based upon the alleged choice facing a parent in an abusive same-sex marriage—stay in the marriage or end the relationship and risk forfeiting all rights to your child—is a false dichotomy. Same-sex and opposite-sex couples are equally capable of both complying with the AIA and seeking the protections of Idaho's divorce and domestic violence laws when appropriate.

C. The Idaho Supreme Court's Decision Does Not Conflict with this Court's Due Process Cases

While the Court's substantive due process cases afford great weight to the protection of the family and the upbringing of children, *Meyer v. Nebraska*, 262 U.S. 390 (1923), at its core this case presents a different question: Who is a parent and how is parenthood determined? None of the Court's precedents establishes a constitutional right to a prescribed method of determining parenthood.

In fact, Petitioner seems confused about the method of determining parenthood she would ask the Court to adopt. Petitioner describes the question presented as whether same-sex married couples have a right to participate in the care, custody and control of children they "agree" to conceive and raise from birth. Pet. i. Elsewhere Petitioner says she seeks to vindicate the constitutional rights of married same-sex couples who "resolve" to have children and raise those children together. Pet. 1. Still elsewhere Petitioner speaks of the

fundamental right of spouses in same-sex marriages to have custody of children "conceived and raised" during the marriage (Pet. 3) or "conceived and born" during the marriage (Pet. 11).

If the Court were to find that the liberty interests protected by the due process clause include the right of a spouse who is not biologically related to a child to be deemed a legal parent, it would also fall to the Court to determine the contours of that liberty interest. Is this fundamental right of parenthood secured simply by virtue of being married to the birth mother? If so, when? At the time of conception, birth or both? Such a rule would merely return us to the days when the common-law marital presumption was conclusive. This would foreclose the rights of biological fathers who are not married to their children's birth mothers but wish to assume the rights and responsibilities of parenthood, even when the child is born into an intact marriage. Such a rule would also force non-biologically related spouses into assuming the burdens of parenthood, whether or not they consented to their wives' decisions to become pregnant.

So such a liberty interest—if it exists—must depend on the consent of the non-biologically related spouse to the pregnancy. But this only begs further questions: When must consent be given—before conception, before birth, or some time afterward? Must consent be written, or can it be evidenced by actions? May consent be implied? May it be withdrawn? More importantly, who is to answer these questions—the unelected justices of this Court or the legislative bodies of the various states? With respect, Respondent believes that

the answers to these questions are not found in the Constitution because the claimed liberty interest does not exist.

As a case in point, Petitioner cites to *Michael H. v. Gerald D.,* 491 U.S. 110 (1989), where a biological father claimed that his genetic relationship entitled him to displace the mother's husband as the "father" of the child. The Court rejected this claim, upholding a California statute stating that a child born to a married woman living with her husband is presumed, with limited exceptions, to be a child of the marriage. The Court said, "It is a question of legislative policy, and not constitutional law, whether California will allow the presumed parenthood of a couple desiring to retain a child conceived within and born into their marriage to be rebutted." *Id.* at 129. Thus, California's near-conclusive presumption of paternity was upheld, but not as a matter of constitutional law. These are areas where states differ, and Idaho's stance does, in fact, differ. Idaho's common-law marital presumption is rebuttable by clear and convincing evidence. *Alber,* 472 P.3d 321 at 326-327 (Idaho 1970). As the Court said in *Michael H.*, this is a matter of legislative policy and not constitutional law. The methods set out by the Idaho legislature for determining parenthood are constitutionally sound and must be respected.

D. The Idaho Supreme Court's Decision Does Not Conflict with the Decisions of Other State Courts

The Idaho Supreme Court's decision in this case does not conflict with the decisions of other state courts cited in the Petition. Pet. 29-33.

1. Contrary to Petitioner's claim, the Washington Supreme Court in *In Re Parentage of L.B.,* 122 P.3d 161, 177 (Wash. 2005), did not recognize that a biological mother's former partner stood as a de facto parent to the child (Pet. 29) and that both the biological and non-biological parent had a fundamental liberty interest in the care, custody and control of the child (Pet. 30). It simply remanded the case to allow the claimant the opportunity to establish her status as a de facto parent. *Id.* at 163. The Washington court found that its common law recognized de facto parents, holds them in legal parity with biological and adoptive parents, and authorizes a court to award parental rights to de facto parents if it is in the best interests of the child. *Id.* at 177. The case did not involve the application of Washington's Uniform Parenting Act ("UPA"), since the trial court found the domestic partner did not have standing to assert a claim under the UPA, *id.* at 165-166, just as the court below found that Petitioner did not have standing under the AIA since she had not complied with the requirements of the AIA.

2. In *Smith v. Guest,* 16 A.3d 920 (Del. 2011) ("*Smith II*"), a non-adoptive partner in a same-sex couple petitioned for custody as a de facto parent under the Delaware Uniform Parenting Act ("DUPA"). She had previously been denied custody, since a de facto parent was not included in the definition of "parent" in the statute. *Smith v. Gordon*, 968 A.2d 1 (Del. 2009) *("Smith I").* Following *Smith I,* the General Assembly amended DUPA to include a de facto parent within the definition of "parent," providing that the amendment would apply retroactively. *Smith II* at 923-924. In

Smith II, the trial court granted custody to the non-adoptive partner based upon the amendment of DUPA, a decision that was affirmed by the Delaware Supreme Court. *Id.* at 923-924. In both *Smith I* and *Smith II*, the Delaware Supreme Court was required to construe and apply statutes enacted by the legislature, as did the court below with respect to the AIA. Both the Delaware and Idaho courts determined that where the legislature has enacted a comprehensive statutory scheme that reflects an unambiguous public policy, the judiciary's role is to give full meaning and effect to the statutes so enacted. *Id.* at 924, 936; Pet. App. 16a, 19a.

3. In *Rosemarie P. v. Kelly B.,* 2021 WL 4697719 (Alaska Oct. 8, 2021), the Alaska Supreme Court affirmed the decision of the trial court declaring the non-biologically related partner in a same-sex couple to be a psychological parent of the child and awarding the psychological parent joint legal and physical custody. *Id.* at *4. The court held that in light of a biologically related parent's constitutional right to custody, a person seeking standing as a psychological parent must prove by clear and convincing evidence "*either* 'that the parent is unfit *or* that the welfare of the child requires the child to be in the custody of the [third party]." *Id.* (Citation omitted). To prove that third-party custody is required, there must be a showing that the child would suffer clear detriment if placed in the sole custody of the parent. *Id.* If the necessary showings are made, the psychological parent is entitled to a trial, with custody determined based on the best interests of the child. *Id.* at *3. The Alaska court noted that the trial court analyzed the statutory best-interests-of-the-child

factors and made detailed, well-supported factual findings related to each factor. *Id.*

4. In *V.C. v. M.J.B.,*748 A.2d 539 (N.J. 2000), cert. denied, 631 U.S. 926 (2000), the New Jersey Supreme Court interpreted N.J.S.A. 9:2-13(f), which provides that "[t]he word 'parent,' when not otherwise described by the context, means a natural parent or parent by previous adoption," *id.* at 547, as giving it jurisdiction to consider whether persons other than natural or adoptive parents might qualify to have custody or visitation with a child. *Id.* at 548. The court went on to decide that the non-biological, non-adoptive claimant had standing to maintain an action for custody and visitation separate and apart from the statute based on her claim to be a psychological parent, *id.* at 550, adopting a four-part test set out in *Custody of H.S.H.-K.,* 533 N.W. 2d 419, 421 (Wis. 1995). *Id.* at 551-552. The court affirmed the appellate division holding that the non-biological, non-adoptive parent had met the burden to establish her status as a psychological parent. The court did not award her joint legal or physical custody, but did award her continued visitation with the children. *Id.* at 555.

5. In *Kulstad v. Maniaci,* 220 P.3d 595 (Mt. 2009), the Montana Supreme Court utilized Montana's nonparental statutory framework to uphold a trial court award of a parental interest to someone who was not related to the children biologically or through adoption, against the wishes of the adoptive parent. *Id.* at 530-534. The court held that Montana's nonparental statutory framework requires the nonparent to establish, by clear and convincing evidence, that the

natural or adoptive parent has engaged in conduct contrary to the parent-child relationship and that the nonparent has established a child-parent relationship as defined in the statute. Section 40-4-228(2)(a)-(b); *id.* at 606. If this burden is met, the court proceeds to determine whether or not it is in the child's best interests to continue that relationship. Section 40-4-228(2)(a)-(b); *id.* at 530. Although Idaho has its own nonparental statutory framework, The De Facto Custodian Act, Idaho Code §§ 32-1701-1705, the Petitioner did not meet the statutory criteria, which require the applicant to be related to a child within the third degree of consanguinity. Of particular note in this case is the comprehensive analysis of Montana's nonparental statutory framework in light of the constitutional challenges to the statute by the adoptive parent. The court recognized that it was a legislative policy choice to enact a comprehensive nonparental statutory framework, and that it was the duty of the court to uphold and apply the statute, as written and as a whole, giving effect to all its provisions, unless the adoptive parent proved that the challenged statutes unconstitutionally infringed on her right to parent her children. *Id.* at 602-609. This is the same process used by the court below in this case in its analysis of Idaho's AIA. Pet. App. 8a-22a.

6. *In re Parentage of M.F.*, 475 P.3d 642 (Kan. 2020), is a case brought under the Kansas Parenting Act ("KPA") by the non-biologically related parent to seek custody of a child born during a same-sex relationship. Petitioner mischaracterizes the holding of the Kansas Supreme Court. Pet. 32. Section 23-2208(a)(4) of the Kansas Statutes Annotated provides

a presumption of paternity (maternity) where a man (woman) "notoriously or in writing recognizes paternity of the child . . ." so it is clear the court was focused on the activities of the non-biological partner, not the biological mother. *Id.* at 659-660. The court did not hold that such proof established parental rights in the non-biological partner; it simply provided standing to proceed with her claim for custody. *Id.* at 659-660. The court ultimately held that the trial court erred by failing to apply the correct legal standards and remanded the case for further proceedings. *Id.* at 662.

Significantly, the Kansas Supreme Court used K.S.A. 23-2220 to apply the Kansas statutory presumptions of paternity—which speak of a "man" who is presumed to be the "father"—equally to mothers and maternity. *Id.* at 651. This is the same type of statutory construction used by the court below when it applied Idaho Code § 73-114(1)(b) to read Idaho's AIA in a gender-neutral manner.

7. In *Boseman v. Jarrell,* 704 S.E.3d 494 (N.C. 2010), a same-sex female couple conceived a child through artificial insemination. The non-biological partner attempted to adopt the child; however, the adoption decree did not comply with the statutory requirement that an adoption decree sever the relationship of parent and child between the individual adopted and that individual's biological or previous adoptive parents. N.C.G.S. § 48-1-106(c); *id.* at 539-540. After the parties' breakup, the adoptive parent sought custody of the child, and the biological mother responded that the adoptive parent did not have standing to seek custody because the adoption decree

was void. *Id.* at 498. The trial court concluded that it did not have authority to void the adoption decree, found that the adoptive parent was a legal parent, and awarded biological mother and adoptive mother joint legal custody under the best-interests-of-the-child standard. On appeal, the North Carolina Supreme Court determined that the adoption decree was void. *Id.* at 547. In doing so, the court applied substantially the same statutory analysis as the court below in this case applied to its review and analysis of the Idaho AIA. Pet. App. 8a-22a. The North Carolina court found the adoption statute to be clear and unambiguous as written and gave the statute its plain and ordinary meaning without interpolating or superimposing provisions or limitations not contained in the statute, noting that this is especially important in the context of adoptions, which are purely a creation of statute. *Id.* at 545. The court ultimately upheld the trial court's alternative analysis that adoptive parent had third-party standing to assert her custody claims, and affirmed the trial court's decision to award the parties joint custody of the child based on the best-interests-of-the-child standard. *Id.* at 549-553.

8. In *Brooke S.B. v. Elizabeth A.C.C.,* 61 N.E. 3d 488 (N.Y. 2016), the New York Court of Appeals overturned its prior ruling in *Matter of Alison D. v. Virginia M.,* 572 N.E.2d 27 (N.Y. 1991), which had held that, in an unmarried couple, a partner without a biological or adoptive relation to the child is not a child's parent for purposes of standing to seek custody or visitation under New York's Domestic Relations Law §70(a). *Id.* at 490. The statute itself does not define the term "parent." In *Brooke S.B.*, the Court of Appeals

held that petitioners' claims that the parties had entered into a pre-conception agreement to conceive and raise a child together, if proven by clear and convincing evidence, would be sufficient to give standing to pursue a claim for custody or visitation. *Id.* at 500. The court stressed that its decision addressed only the ability of a person to establish standing as a parent to petition for custody and visitation, and cautioned that "the ultimate determination of whether those rights shall be granted rests in the sound discretion of the court, which will determine the best interests of the child." *Id.* at 501.

9. In *Eldredge v. Taylor,* 339 P.3d 888 (Okla. 2014), the Oklahoma Supreme Court held that written co-parenting agreements entered into between a biological mother and her domestic partner with respect to children born during the relationship did not violate Oklahoma law or public policy and were legal and enforceable. *Id.* at 893. The court did not consider biological mother's contentions that the agreements violated Oklahoma's parentage and artificial insemination acts because biological mother did not cite to specific provisions of those laws or submit supporting authority to the court. The court found that the public policy of Oklahoma requires a trial court to consider the best interests of the children before they lose one of their only two parents, and reversed the decision of the district court granting the motion to dismiss. In so doing, the court limited its holding to the unique and compelling facts before the court. *Id.* at 895.

10. In *Mullins v. Picklesimer,* 317 S.W. 3d 569 (Ky. 2010), the Kentucky Supreme Court concluded that a biological mother's former same-sex partner did not qualify as a de facto custodian under Kentucky's statute, because the statute required a person to be the primary caregiver and financial supporter of a child for the statutory period of time. *Id.* at 574. However, the court went on to apply a line of cases which provided that a non-parent who could not qualify as a de facto custodian could pursue a custody claim upon proving—by clear and convincing evidence—one of two exceptions to the parent's superior right to custody: (i) that the parent is an unfit custodian; or (ii) that the parent has waived his or her superior right to custody. *Id.* at 578, citing *Moore v. Assente,* 110 S.W.3d 336, 359 (Ky. 2003). Finding that a waiver had occurred, the court reinstated the decision of the trial court granting the parties joint custody of the child. *Id.* at 579.

11. *D.M.T. v. T.M.H.,* 129 So.3d 320 (Fla. 2013), involved the donation of an egg which was fertilized in vitro and implanted in the egg donor's same-sex partner, who then gave birth to the child. A Florida statutory scheme regulates such proceedings. *Id.* at 329-330. After the parties' relationship ended, the egg donor filed for custody of the child, which the trial court denied because Florida's statutory scheme automatically terminates an egg donor's potential parental rights at the time of the donation. *Id.* at 330. The Florida Supreme Court invalidated the statutes as violations of due process under both the Florida and United States Constitution, as well as Florida's constitutional privacy rights, because they deprive a biological mother of parental rights where she was an

intended parent and actually established a relationship with the child. *Id.* at 347. The court also invalidated the statutes as equal protection violations under the Florida and United States Constitutions in providing exceptions for relinquishment of parental rights for egg and sperm donors who are part of an opposite-sex couple, but not for those who are part of a same-sex couple. *Id.* at 347. This issue is irrelevant to the case at bar. Petitioner is not a biological parent of the child born during her marriage. And the court's equal protection analysis is based upon provisions of the Florida statute relating to semen, egg and oocyte donation which are not found in the Idaho AIA or any Idaho statute. Moreover, the court below construed and applied Idaho's AIA in a gender-neutral, sexual-orientation-neutral fashion, so the improper classification problem does not exist in this case.

None of these cases involves the application and interpretation of an artificial insemination statute. The cases show state courts applying varied statutory schemes and common-law principles—such as de facto parent, psychological parent and third-party standing—to unique, individualized fact patterns. Where a statute is involved, the state courts uniformly apply the canons of statutory interpretation applied by the court below to Idaho's AIA: considering the statute as a whole and not reading provisions in isolation; giving words their plain, usual and ordinary meanings; giving effect to all words and provisions of a statute so that none will be void, superfluous or redundant; and interpreting statutes so as to uphold their constitutionality whenever possible. Pet. App. 16a-17a. Where common-law principles are involved, the cases

generally allow persons who are not biologically related to a child the chance to obtain legal parenthood by making a required showing (e.g., that the natural parent is unfit, that the welfare of the child requires third-party custody or that the natural parent has engaged in conduct contrary to the parent-child relationship) and proving in trial that such is in the best interests of the child. This is exactly what the magistrate court did in the case below. She applied Idaho's common-law *Stockwell* standard, which requires a showing that the child has been in the custody of a third party for an "appreciable period of time." Pet. App. 79a-88a. Even though the magistrate ruled that the showing had not been made, she proceeded to apply the best-interests-of-the-child analysis and determined on the basis of evidence presented in a three-day trial that it was not in the child's best interest for Petitioner to have custody of her. Pet. App. 88a-91a.

The fact that child custody may have been decided differently in this case than in some of the cases cited above does not create a conflict which warrants this Court's intervention. And the fact that states are using different paths to analyze and decide these cases shows that they are not capable of being resolved by a simple, bright-line rule imposed by this Court.

E. The Opinion Below Will Have a Limited Impact and a Proposed Remedy Is Not Readily Apparent

1. As the court below noted in its opinion, the Petitioner raised legal issues that were a matter of first impression in Idaho. Pet. App. 30a. In point of fact,

since the AIA was enacted in 1982, there have only been two reported decisions concerning the act: this case; and the case of *Doe v. Doe,* 395 P.3d 1287 (Idaho 2017). In *Doe*, the Idaho Supreme Court affirmed the lower court's dismissal of petitioner's claims of parentage based upon the AIA, holding that the plain language of the statute does not address a child conceived by artificial insemination to an unmarried couple. *Id*. at 1291. The decision below has not been cited in any reported cases since it was handed down.

2. Idaho's AIA is different from the artificial insemination statutes in other states. Therefore, the decision of the court below is unlikely to affect the interpretation or application of artificial insemination statutes in other states.

3. Idaho's AIA affects only those who use artificial insemination in Idaho. Idaho is a sparsely populated state with fewer than 2 million inhabitants.[2] It is likely that only a small percentage of that population uses artificial insemination.

4. If the Court reviews this case, and the decision of the court below is reversed, it is unclear that there is a remedy for the Petitioner. Petitioner fully participated in a three-day trial in the magistrate court, and was provided the opportunity to submit evidence supporting her claims to child custody. Despite finding that Petitioner lacked standing to pursue a custody claim under all legal theories raised,

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[2] As of July 1, 2021, Idaho's estimated population is 1,900,923 according to the United States Census Bureau.

the trial court nevertheless engaged in a comprehensive best- interests-of-the-child analysis and found, based upon the factors set forth in Idaho Code § 32-717, that it was not in the child's best interest for Petitioner to have legal custody, physical custody or visitation with the child.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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