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 A WRIT OF CERTIORARI
TO THE SUPREME COURT OF IDAHO

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Respondent admits that "[t]his 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." Opp. 1. More fundamentally, this case tests whether this Court meant what it said in *Obergefell v. Hodges*, when it held that same-sex couples share the same protected "'right to "marry, establish a home and bring up children"'" that opposite-sex couples have long enjoyed. 576 U.S. 644, 668 (2015) (quoting *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923))).

The decision below flouts that principle by holding that Petitioner lacks any constitutionally-protected interest in the care or custody of her daughter, whom she and her wife agreed to conceive and raised together from birth within their marriage. By treating half of every same-sex couple as a legal stranger to their children, the decision threatens to return same-sex couples and their children to the same paradigm of insecurity, instability, and impermanency against which *Obergerfell*'s constitutional holding was supposed to "safeguard[] children and families." *Id.* at 667-68. This Court's intervention is needed to prevent that result and to ensure that *Obergefell*'s critically important holding is not undermined.

Intervention is also warranted to address Idaho's unequal treatment of opposite-sex and same-sex couples. Respondent concedes that the decision below would deprive half of all same-sex couples of a statutory path to parenthood available to opposite-sex couples. Opp. 16. It would likewise impose a series

of invasive burdens on same-sex couples seeking to have children that "do[] not apply" to nearly all opposite-sex couples. Opp. 15-16. Tellingly, moreover, Respondent cannot point to a single opposite-sex couple upon whom those burdens have ever actually been enforced. Such unequal treatment of same-sex couples is likewise incompatible with this Court's precedent.

Although Respondent devotes much of her response to parsing the decisions of other state courts, she ultimately admits that the result in this case "differ[s]" from that which would follow in numerous other states. Opp. 20; *see also id.* at 29-30. But a married couple's fundamental interest in the care and custody of children that they work to conceive and raise together should not turn on what state they live in, nor the couple's sexual orientation. This Court's intervention is warranted.

REASONS FOR GRANTING THE PETITION

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

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

1. The Due Process Clause indisputably affords both spouses in a marriage a fundamental liberty interest in the care, custody, and control of the children born and raised within that marriage. Pet. 13-20. The Court's decision in *Obergefell v. Hodges*, left no doubt that this fundamental right extends to same-sex marriages. 576 U.S. 644, 667-70 (2015). The Idaho Supreme Court's decision in this case, however, vitiated that fundamental right by refusing

to recognize any legal relationship between Petitioner and her daughter. Pet. 20-24.

Respondent's opposition is virtually silent about these problems with the decision below. She does not dispute 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*, 576 U.S. at 668 (quoting *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (citation omitted)). Nor does she deny that *Obergefell* treated those rights as a "*unified* whole," and affirmed that those rights apply equally to same-sex couples. *Id.* at 665, 668 (emphasis added). Neither does she contest that *Obergefell* was intended to afford stability and permanency to same-sex families, and thereby prevent the children of a same-sex marriage from being "legal strangers to one of their parents." Pet. 18-20 (citation omitted). The Idaho Supreme Court majority's decision, however, would deprive same-sex couples of the very rights *Obergefell* enshrined, and expose same-sex families to the very harms that *Obergefell* was intended to eliminate. Respondent does not even attempt to argue otherwise.

2. Instead, Respondent's limited response to Petitioner's due process argument advances two arguments for why this Court should not get involved. Neither is convincing.

a. Respondent principally seeks to discourage this Court from intervening by suggesting (at 18-20) that if this Court reaffirms that same-sex couples share a liberty interest in the care and custody of their children, difficult line drawing problems might arise in a different case involving different facts. That misses the mark for many reasons.

This case presents none of the line drawing questions about which Respondent speculates. Petitioner and Respondent were married when they agreed to have a child; both consented to the child's conception by artificial insemination; Petitioner was intimately involved in supporting Respondent's conception and pregnancy; Petitioner and Respondent together held themselves out as P.G.'s parents after her birth; they even secured a birth certificate from Idaho attesting to the fact that *both* Petitioner and Respondent were P.G.'s mothers; and they together shared responsibility for, cared for, and raised P.G. from birth in their marital home. Pet. 3-4. This case thus raises none of the line-drawing questions suggested by Respondent, underscoring that this is a particularly good vehicle for this Court's intervention.

In any event, Respondent's concern about line-drawing is misplaced. Courts have dealt comfortably with line drawing in this area for decades. In *Lehr v. Robertson*, for instance, this Court held that an unwed biological father's due process right to share in the care and custody of his child depends on having "grasp[ed] that opportunity and accept[ed] some measure of responsibility for the child's future." 463 U.S. 248, 262 (1983). Application of that standard might prove challenging in a particular case. But that did not discourage this Court from recognizing that an unwed father can prove a constitutionally protected interest in the care and custody of his child. Whatever line-drawing may need to occur in some future case is no reason to deprive *all* married, same-sex, non-biological parents of a constitutional interest

in the children that they plan for, work to conceive, and raise within their marriage.[1]

b. Respondent relatedly argues (at 20) that the question of when same-sex parents have a right to the care and custody of their children is a question of legislative prerogative, not constitutional law. In making this argument, however, Respondent ignores that this Court has long recognized that "there is a constitutional dimension to the right of parents to direct the upbringing of their children." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). Indeed, "the 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." *Id.*; *see also* Pet. 13-20.

In arguing that no liberty interest applies here, Respondent principally points to *Michael H. v. Gerald D.*, in which a four-Justice plurality of this Court upheld California's choice to prioritize the parental rights of a married couple to a child "conceived within and born into their marriage" over those of the biological father, when the child was born as a result of adultery. 491 U.S. 110, 129-30 (1989).

Respondent draws the wrong lessons from *Michael H.* To begin with, *Michael H.* underscores that the touchstone for whether a married couple enjoys a protected interest in the care and custody of their child is not biology but the liberty afforded married

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[1] Respondent tries to inject further ambiguity into the exercise by pointing out that Petitioner sometimes uses slightly different words to describe conduct underlying the right at issue, such as whether a couple "agree[s]" or "resolve[s]" to have children together. Opp. 18-19 (discussing Pet. i, 1). But Petitioner's use of synonyms creates no inconsistency.

couples to structure their family life. Pet. 15-18; *see also Zablocki*, 434 U.S. at 386 ("[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.).

More importantly, Respondent ignores that Petitioner's interest in the care and custody of her child in this case is different from and more substantial than that of the biological mother's husband in *Michael H.* Unlike in that case., the child at issue here is not the product of adultery *outside* the marriage, but rather a consensual decision by a married couple to conceive and raise a child *within* the marriage. Petitioner's due process interest in this case, therefore, fits comfortably within *Obergefell*'s observations that "'[t]he right to "marry, establish a home and bring up children"'" is part of a "unified whole," and "a central part of the liberty protected by the Due Process Clause." 576 U.S. at 668 (citations omitted). *Obergefell*'s recognition that same-sex couples enjoy those same rights—even though one same-sex parent lacks a biological relationship to the couples' children—is sufficient to reject Respondent's claim (at 19) that a non-biologically-related parent in a same-sex marriage lacks any constitutional interest in the care or custody of his or her children.

3. The decision below is fundamentally incompatible with this Court's due process precedents and would deeply undermine this Court's decision in *Obergefell*. Pet. 13-24. This Court should intervene to prevent that unwarranted and harmful result.

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

The decision below also conflicts with this Court's equal protection jurisprudence by depriving same-sex couples of equal access to the benefits of marriage. In *Obergefell* and *Pavan v. Smith*, 137 S. Ct. 2075 (2017), this Court made clear that the same-sex couples are entitled to exercise the fundamental right to marry "on the same terms and conditions as opposite-sex couples." *Obergefell*, 576 U.S. at 675-76. This Court likewise affirmed that the equal protection clause guarantees same-sex couples not only the right to marry itself, but rather equal access to the same "constellation of benefits that the States have linked to marriage"—including "child custody." *Id.* at 670; *Pavan*, 137 S. Ct. at 2076-79.

Respondent does not appear to contest any of that. Her principal defense is to claim that Idaho regulates parental rights in a "gender-neutral, sexual-orientation-neutral manner" that "applies equally to same-sex and opposite-sex couples." Opp. 2. That is wrong.

1. First, the AIA does not create parental rights in a gender- or sexual-orientation-neutral manner because it provides no mechanism for half of all same-sex couples (same-sex male couples) to obtain parental rights through artificial insemination. Respondent dismisses that unequal treatment as "irrelevant" because Petitioner herself is not male. That misses the point. As Respondent herself admits, the AIA must be interpreted in a gender-neutral manner that applies equally to opposite-sex and same-sex couples. Opp. 13. By reading the AIA to treat same-sex female and male couples differently,

and to preclude half of same-sex couples from securing rights through artificial insemination at all, the Idaho Supreme Court majority's construction of the AIA flunks that requirement.

Respondent tries to evade that conclusion by suggesting that same-sex male couples do not conceive using artificial insemination at all, but instead rely on gestational surrogacy. That is both inaccurate and immaterial. First, same-sex male couples often conceive through artificial insemination. *See* Pet. 26 (citation omitted). Second, neither the AIA nor any other Idaho provision provides an equivalent route to obtaining parental rights through surrogacy. In fact, the Idaho Supreme Court has expressly rejected that such a statutory path exists. *Doe v. Doe*, 372 P.3d 1106, 1108 (Idaho 2016) (legislature has not "enact[ed] legislation specifically addressing surrogacy").[2] The record is thus clear—the AIA as construed by Idaho's Supreme Court does not apply neutrally with respect to gender or sexual orientation.

2. Even leaving the problem of same-sex male couples aside, Respondent acknowledges that the AIA imposes a variety of burdens on same-sex couples that almost no opposite-sex couple is required to bear. *See* Opp. 14-16 She does not contest, moreover, that these burdens meaningfully intrude on a couple's autonomy and privacy, and impose an expense that some couples cannot bear. Pet. 27.

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[2] The lower court decision in *Doe* went even further, holding that surrogacy contracts are void as against public policy. *See* 372 P.3d at 361. The Idaho Supreme Court did not reach that issue on appeal. *Id.* at 362.

Instead, Respondent's only response (at 15-16) is to claim that the infinitesimally few opposite-sex married couples that seek to conceive via artificial insemination from a third party sperm donor are subject to the same regime. *See* Pet. 27-28 & n.4. Under that reading, a law that discriminates against 100% of same-sex couples would be constitutionally unproblematic so long as a bare handful of opposite-sex couples were somehow impacted. Respondent points to no authority for that proposition. Nor does she respond to the contrary authority noted in the petition. Pet. 27-28.

3. Even if the AIA could theoretically apply to an opposite-sex couple, there is no evidence that Idaho has ever applied it to burden one. Pet. 28. Respondent again offers no contrary evidence. Instead, it faults Petitioner for failing to point to opposite-sex couples treated as parents despite noncompliance with the AIA. But Idaho has admitted that no Idaho couple has ever complied with the AIA's provisions. *See* Pet.App.35a. Yet Idaho has never stripped an intended parent of parental rights for noncompliance until this case.

4. Respondent's opposition highlights still another way in which Idaho's actions in this case treats opposite-sex and same-sex couples differently. In *Pavan*, this Court held that an Arkansas law violated the Equal Protection Clause by requiring the placement of a birth mother's husband on a child's birth certificate following sperm donation, but denying that right to married same-sex couples. 137 S. Ct. at 2078-79.

All agree that Idaho here *does* issue birth certificates to same-sex couples listing both members of that couple as the child's parents. Pet. 4-5. But

Respondent herself suggests Idaho's issuance of such birth certificates is an empty gesture, overcome whenever the birth mother's same-sex spouse is not in fact a biological parent (i.e. *in every case*). Opp. 11. This Court cannot permit *Pavan* to be circumvented so easily. That is particularly so because the fact that Idaho issues birth certificates to same-sex couples at all suggests that—as *Pavan* noted of Arkansas—birth certificates do more than serve as a "mere market of biological relationships." 137 S. Ct. at 2078.

For all these reasons, Idaho's statutory regime singles out same-sex couples for unequal treatment. This Court intervention is warranted to prevent that result and vindicate the principles it articulated in *Obergefell* and *Pavan*.

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

Respondent devotes much of her opposition to addressing various other state court decisions that—unlike the court below—recognize that both members of a married same-sex couple share a right to the care and custody of their children. Respondent argues that every case is distinguishable, but in so doing misses the forest for the trees. What matters is that—as she concedes—many of the other state courts would decide child custody "differently" than Idaho did here, with many states "generally allow[ing] persons who are not biologically related to a child" to obtain legal parenthood upon participating in the conception and raising of a child as Petitioner did here. Opp. 29-30. That so many states "differ" in their approach, Opp. 20, is all the more reason to reaffirm a constitutional baseline, rather than subject families to a patchwork of unstable rules from state to state.

III. The Question Presented Is Exceptionally Important And Warrants Review In This Case

Respondent's efforts to downplay the significance of the decision below or the need for this Court's review are unavailing.

1. Although Respondent opens her brief by acknowledging that this case presents a question of "vital interest" to the parties, Opp. 1, the State of Idaho, and others, Respondent closes by suggesting that this case would have only a "[l]imited [i]mpact" because "Idaho is a sparsely populated state," Opp. 30-31. But whether same-sex couples are entitled to the same fundamental right to share in the custody and care of their children that opposite-sex couples enjoy is a question of far-reaching importance to millions of Americans nationwide, not just Idahoans. Whether the decision below will be permitted to hinder the "permanency and stability" that *Obergefell* promised to same-sex couples and their children is likewise an issue of surpassing importance.

The decision also will generate "profound ramifications, many untoward" in Idaho if it is not overturned. Pet.App.36a (Stegner, J., dissenting); *see also* Pet. 34-35. Thousands of Idaho families will be destabilized. Meanwhile, the decision will enable some Idaho parents to escape financial and personal responsibilities to their child, while forcing other parents to choose between remaining in unhappy or even violent marriages or giving up a relationship with their child. Respondent insists that these dire consequences are easily avoided so long as couples simply obey the AIA. Opp. 17. But no Idaho couple has complied with the AIA for four decades, Pet. 7—

for those thousands of couples and their children, and many more surely to come, the consequences are all too real.

2. Respondent also posits (at 31-32) that reversal would not provide Petitioner with "a remedy" because the courts below already concluded "that it was not in the child's best interest for Petitioner to have legal custody, physical custody or visitation with the child." But as Petitioner has explained, the Idaho courts' "best interests" analysis was expressly premised on its threshold belief that Kylee—and only Kylee—had a "fundamental constitutional . . . right to the custody, care, and control of [P.G.]." Pet.App. 4a; *see also* Pet.App.79a. As a result, the Idaho courts afforded superior weight to Kylee's interests and minimal weight to Linsay's. If this Court holds that Linsay shares a constitutionally protected interest in P.G.'s care or custody, Idaho's courts would be required to redo the best interests analysis on remand.

3. The questions presented are important and warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

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