## REASONS FOR GRANTING THE PETITION

### I. THE *OAKLEY* DECISION CONFLICTS WITH PRIOR DECISIONS OF THIS COURT INVOLVING THE FUNDAMENTAL RIGHT TO PROCREATE.

In the decision below, *Wisconsin v. Oakley*, 629 N.W.2d 200 (Wis. 2001), the Wisconsin Supreme Court upheld a prohibition on future procreation as a condition of probation for a man convicted of intentionally failing to pay child support. The court conditioned any lifting of the procreation ban on the defendant's demonstrating "that he had the ability to support . . . [his children] and that he is supporting the children he already had." *Id.* at 203. The defendant, David Oakley, is the father of nine children and has an arrearage of approximately $25,000 in his child support obligations, *id.* at 202, although he has paid in excess of 70% of his obligations. Wisconsin v. Oakley, 635 N.W.2d 760, 761 (Wis. 2001) (Abrahamson, C.J., concurring).

In a long line of cases beginning with *Skinner v. Oklahoma ex rel Williamson*, 316 U.S. 535 (1942), this Court has recognized that the right to procreate is "one of the basic civil rights of man." *Id.* at 541. Thirty-five years later, in *Carey v. Population Services International*, 431 U.S. 678 (1977), the Court explained that "[a]lthough 'the Constitution does not explicitly mention any right of privacy,' the Court has recognized that one aspect of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment is 'a right of personal privacy . . . .'" *Id.* at 684 (quoting *Roe v. Wade*, 410 U.S. 113, 152 (1973)). The *Carey* Court continued:

> It is clear that among the decisions that an individual may make without unjustified government interference are personal decisions 'relating to marriage, *Loving v. Virginia*, 388 U.S. 1, 12 (1967); procreation, *Skinner*

> *v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541-542 (1942); contraception, *Eisenstadt v. Baird*, 405 U.S. at 453-54; *id.* at 460, 463-65 (White, J., concurring in result); family relationships, *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); and child rearing and education, *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).'

431 U.S. at 684-85 (quoting *Roe v. Wade*, 410 U.S. 113, 152-53 (1973)). Thus, this Court stated in *Carey*, "[T]he decision whether or not to beget or bear a child is at the very heart of this cluster of constitutional choices." 431 U.S. at 685.

In *Zablocki v. Redhail*, 434 U.S. 374 (1978), this Court considered another Wisconsin case involving a statute that required court permission to marry for any "Wisconsin resident having minor issue not in his custody and which he is under obligation to support by any court order or judgment." *Id.* at 375. Under the statute, the Wisconsin courts could not grant such permission to marry unless the resident demonstrated compliance with the support order and also proved that the children "are not then and are not likely thereafter to become public charge." *Id.*

In striking down the Wisconsin statute, this Court applied heightened scrutiny, stating, "When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailed to effectuate those interests. *Id.* at 388. Describing the compelling state interest in the statute as the provision of an "incentive for the applicant to make child support payments to his children," *id.* at 389, the Court nevertheless stated, "This 'collection device' rationale cannot justify the statute's broad infringement on the right to marry." *Id.* at 389. The Court listed a number of other, equally effective means of collecting child support payments, including "wage assignments, civil contempt proceedings, and criminal penalties." *Id.* at 390.

The similarities between *Zablocki* and *Oakley* are obvious. In both cases, a man's

financial inability to support his existing children bar him from the exercise of a fundamental right, in *Zablocki*, the right to marry, and in *Oakley*, the right to procreate. In both cases, equally effective alternative means were available to promote the state's interest of financial support for children. 629 N.W.2d 200, 218 (Wis. 2001) (Bradley, J., dissenting). Despite these similarities, the majority in *Oakley* applies a reasonableness test to uphold the no-procreation condition. By contrast, the three dissenting justices, applying heightened scrutiny review as in *Zablocki*, found the condition not narrowly tailored and thus unconstitutional. *Id.* at 219 (Bradley, J., dissenting). This Court should agree to review the decision in *Oakley* to resolve the conflict between *Oakley* and this Court's decisions recognizing the existence of a fundamental right to privacy.

## II. THERE IS A DIRECT CONFLICT BETWEEN THE DECISION BELOW AND DECISIONS OF OTHER STATE COURTS.

Wisconsin is one of a minority of states that has upheld a ban on procreation as a condition of probation. *Cf. State v. Kline*, 963 P.2d 697, 699 (Or. App. 1998) (requiring probationer to forego fathering another child until completion of drug counseling and anger management treatment). The Wisconsin Supreme Court reached its conclusion despite the fact that the court has acknowledged that the right to procreate is a fundamental constitutional right. *See In the Matter of Eberhardy*, 307 N.W.2d 881 (Wis. 1981).

A number of other states have addressed the issue of prohibiting procreation as a probation condition and have found such a prohibition to be not narrowly tailored and thus unconstitutional. In *People v. Pointer*, 151 Cal. App. 3d 1128 (1984), a California Appeals Court reversed a lower court's probation restriction that barred an abusive mother from becoming pregnant. The court stated that the restriction was overbroad and coercive of abortion. The court

suggested narrower alternatives that could be adopted including pregnancy testing, prenatal supervision of the mother, and removal of the child from the mother at birth. *Id.* at 1140-41. See also *People v. Zaring*, 8 Cal. App. 4th 362 (1992) (invalidating no-pregnancy condition of probation for woman convicted of drug offenses). The Kansas Court of Appeals invalidated a similar no-pregnancy condition of probation in *State v. Mosberg*, 768 P.2d 313, 314-15 (Kan. App. Ct.1989), citing precedents from Florida, *Rodriguez v. State*, 378 So. 2d 7 (Fla. Dist. Ct. App. 1979), and Ohio, *State v. Livingston*, 53 Ohio App. 2d 195 (1976). A Florida court also disallowed a probation procreation prohibition in a case of an abusive father in *Howland v. State*, 420 So. 2d 918 (Fla. Dist. Ct. App. 1982), finding that less restrictive alternatives were available such as an order prohibiting the defendant from having contact with his child.

These decisions are in marked contrast in the Wisconsin Supreme Court's decision in *Oakley*. The split among the states on the constitutionality of a prohibition on procreation as a condition of probation creates disparate treatment of defendants from different states concerning the exercise of a fundamental right and warrants resolution by this Court.

## III. EVEN UNDER THE WISCONSIN SUPREME COURT'S MORE LENIENT TEST, THE PROBATION CONDITION IS NOT REASONABLY RELATED TO THE STATED OBJECTIVE.

The majority of the Wisconsin Supreme Court rejected the use of a strict scrutiny standard of review and articulated a reasonableness test to evaluate the abridgement of a probationer's fundamental rights. According to the court, "A condition is reasonably related to the goal of rehabilitation if it assists the convicted individual in conforming his or her conduct to the law." 629 N.W.2d 200, 213. The court considered the imposition of the procreation ban to

be reasonably related to Oakley's rehabilitation because "the condition essentially bans Oakley from violating the law again," *id.*, presumably by preventing him from producing more children whom he might refuse to support. However, the *Oakley* dissent pointed out that the condition might produce the opposite of its intended effect of procuring child support since Oakley would likely be returned to prison upon the birth of another child, thereby rendering him unable to support both the newly born child as well as his older children. *Id.* at 220 (Bradley, J., dissenting). Moreover, since the circuit court judge acknowledged that Oakley is unlikely ever to be able to make up the arrears and fully support his nine children even with full-time employment, *id.* at 217-18 (Bradley, J., dissenting), the probation condition will have no effect on the problem the state wants to address, namely the support of Oakley's offspring. Thus, even under the majority's more lenient test, the condition is not reasonable.

## IV. THE CONSEQUENCES OF THIS DECISION WILL BE WIDESPREAD AND CONTRARY TO LONG-ESTABLISHED PUBLIC POLICY.

The Wisconsin Supreme Court majority, in barring David Oakley from procreating during the term of his probation, ignores the serious public policy implications of its decisions. Many of these "unacceptable collateral consequences," *Oakley*, 629 N.W.2d 200, 219 (2001 (Bradley, J., dissenting), were mentioned in the dissents of Justices Bradley and Sykes, both joined by Chief Justice Abrahamson.

Justice Sykes called the condition "a compulsory, state-sponsored , court-enforced financial test for future parenthood, *id.* at 221 (Sykes, J., dissenting), while Justice Bradley stated that "by allowing the right to procreate to be subjected to financial qualification, the majority imbues a fundamental liberty interest with a sliding scale of wealth." *Id.* at 219 (Bradley, J.,

dissenting). The decision of the Wisconsin court predicated Oakley's release from the probation condition on a showing "that he can support" all his children, *id.* at 201, not upon the condition that he must comply with any support orders. The allowance of such a condition of probation by a state's highest court amounts to means testing for parenthood since, as stated above, the circuit court judge acknowledged that Oakley is unlikely ever to be able to make up the arrears and fully support his nine children, even with full-time employment. *Id.* at 216, 217-18 (Bradley, J., dissenting).

The allowance of such a condition is also "coercive of abortion." *Id.* at 219 (Bradley, J., dissenting). Justice Bradley, quoting *People v. Pointer*, 151 Cal. App. 3d 1128 (1984) (overturning on constitutional grounds an anti-pregnancy condition of a woman's probation), stated, "[T]he surreptitious procuring of an abortion might be the only practical way to avoid going to prison. *Oakley*, 629 N.W.2d at 219 (Bradley, J., dissenting) (quoting *Pointer*, 151 Cal. App. 3d at 1140). Other courts have worried that a no-pregnancy condition criminalizes a contraceptive failure. See *State v. Mosburg*, 768 P.2d 313, 315 (Kan. App. Ct.1989) (expressing its concern that "[t]he State should not have the power to penalize Mosburg if she uses contraceptives which for some reason fail to prevent pregnancy"). Moreover, the no-procreation condition is virtually unenforceable, especially concerning a male probationer who, after all, will not be the only actually becoming pregnant. The state has not suggested that the defendant have no sexual contact with women, and it is certainly not practicable to administer pregnancy tests to every woman who is ever alone with the defendant. Until and unless there is a paternity suit or new child support order naming the defendant as the father, there would be no way for the state to know if the defendant had violated the terms of his probation.

In summary, certiorari should be granted in the case of *Wisconsin v. Oakley* in order to

prevent disparate treatment of defendants from different state concerning the right to procreate; in order to clarify the appropriate test to be used by courts in assessing when a condition of probation may restrict a fundamental right and in order to prevent the widespread national consequences of this decision.