

No. 17-942

In the Supreme Court of the United States

R.K.B. AND K.A.B., PETITIONERS,

v.

E.T.

*On Petition for a Writ of Certiorari to the
Supreme Court of the State of Utah*

**BRIEF OF *AMICI CURIAE* NATIONAL
COUNCIL FOR ADOPTION
SUPPORTING PETITIONERS**

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QUESTION PRESENTED

Does the Indian Child Welfare Act define “parent” in 25 U.S.C. 1903(9) to include an unwed biological father who has not complied with state law rules to attain legal status as a parent?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES	iii
INTERESTS OF <i>AMICI</i>	1
SUMMARY OF THE ARGUMENT	1
REASONS FOR GRANTING THE PETITION.....	4
I. Utah’s Adoption Law Reflects a Careful Balancing of the Interests of Children and Parents with the Interests of Children Treated as Paramount in the Calculus.	5
A. Utah’s Adoption Laws Prioritize Children’s Interests.....	7
B. Utah’s Adoption Laws Provide Essential Protections Tailored to the Unique Vulnerabilities Experienced by Unwed Mothers.	10
C. Utah’s Adoption Laws Protect the Right of Unwed Fathers to Preserve Their Parental Opportunities.....	12
D. Utah’s Adoption Laws Advance Compelling State Interests.....	16
E. Utah’s Adoption Laws Appropriately Consider All Relevant Circumstances in Striking a Balance Between the Various Interests and Rights of the	

Parties that Would be Disturbed by Introducing
 Novel and Nebulous Legal Standards. 19
 CONCLUSION..... 21

TABLE OF AUTHORITIES

Page(s)

Cases

Adoption of A.A.T., 196 P.3d 1180, 1195 (Kansas
 2008) 18
Baby Girl T., 2012 UT 78 passim
Lehr v. Robertson, 463 U.S. 248, 263 (1983).6, 14, 18,
 21
Michael M. v. Superior Court, 450 U.S. 464, 471
 (1981). 10
Sanchez v. L.D.S. Social Services, 680 P.2d 753, 755
 (Utah 1984)..... 6, 9, 15
T.M. v. B.B., 2010 UT 42 15, 16
Thurnwald v. A.E., 2007 UT 38 18, 19
Wells v. Children’s Aid Society of Utah, 681 P.2d 199,
 203 (Utah 1984)..... passim

Statutes

Utah Code 78B-6-102(1) 7
 Utah Code 78B-6-102(5) passim
 Utah Code 78B-6-102(6) 13
 Utah Code 78B-6-102(7) 11

Utah Code Ann. 78B-6-102(3)6

Other Authorities

Mark Regnerus, *How Different are the Adult Children of Parents who have Same-Sex Relationships? Findings from the New Family Structures Study* 41 SOCIAL SCIENCE RESEARCH 752, 764 (2012)8

Timothy S. Grall, *Custodial Mothers and Fathers and Their Child Support: 2009*, Current Population Reports P-60-240 at 6 Table 2 (U.S. Census Bureau, December 2011).....11

W. BRADFORD WILCOX, ET AL., WHY MARRIAGE MATTERS, THIRD EDITION: THIRTY CONCLUSIONS FROM THE SOCIAL SCIENCES at 14-15, 22-23, 28-30, 37, 40 (2011)7

INTERESTS OF *AMICI*¹

The National Council For Adoption (NCFA) is a nonprofit advocacy organization promoting a culture of adoption. It has, for thirty-seven years, provided guidance and education on best practices in adoptive placements. NCFA is the only institution that currently collects and disseminates statistics on domestic infant adoptions. It serves children, birthparents, adoptive families, adult adoptees, adoption agencies, U.S. and other governments, policymakers, media and the public. NCFA has trained more than 20,000 individuals on counseling expectant parents on the option of adoption and created a curriculum that many communities still use for this purpose. Given its unique expertise, NCFA believes it can provide important insight to this Court about the varying interests implicated by the legal issues raised in this case.

SUMMARY OF THE ARGUMENT

This case presents the question of whether carefully drafted and comprehensive adoption procedures enacted by the states should be replaced by a vague standard of “reasonableness” inferred by some judges from the language of the Indian Child Welfare Act.

In the decision at issue in this case, and similar decisions from other states, the Indian Child Welfare

¹ No one other than *amici* and their counsel authored any part of this brief or made a monetary contribution to fund its preparation or submission. All parties have consented to the filing of this brief. Counsel for all parties received the requisite ten-day notice.

Act has been interpreted to include an inferred legal standard for determining the rights of unwed fathers in contested adoptions involving Indian children. Critically, this implied standard is vague and amorphous and trumps the carefully developed state standards for determining the relative weight to give various interests in a contested adoption. The statutory approach of the State of Utah discounted by a majority of the Utah Supreme Court in this case provides a good illustration of the careful balancing states have adopted to ensure protection of the rights of all parties to a contested adoption, and which prioritizes the critical interests of the child involved. Utah’s comprehensive approach stands in stark contrast to the open-ended, non-statutory rule the court below suggests is required by its reading of ICWA. The contrast is most evident in the relative prioritization of children’s interests. Utah’s statutory approach ensures an unwed father will demonstrate full commitment to care for the child. The “reasonableness” standard said to be implicit in ICWA does not.

It is crucial in assessing this claim—that an inference from ICWA should supersede state adoption statutes—to consider the context for adoptions of children conceived out of wedlock. This context explains Utah’s statutory approach and illustrates why the normal approach to domestic relations disputes, to apply state law determinations where there is no direct superseding federal requirement, is superior to an implied reasonableness requirement. Utah’s adoption statutes balance the interests of children, parents and the community, recognizing that increasing

or decreasing the burdens on one party to an adoption is likely to create burdens for others.

Thus, the statutes reflect the reality that children conceived out of wedlock are at greatly increased risk to be raised in difficult circumstances and can often greatly benefit from adoptive placement. This is facilitated by the statutory requirements that fathers who desire to contest a placement chosen by the mother strictly comply with the requirements meant to ensure their assumption of full responsibility for the child and by the requirement of speedy establishment of clear parental responsibility.

The law also reflects the unique vulnerabilities of unwed biological mothers who experience much different and more exacting consequences than do unwed biological fathers as a result of the conception. The laws thus appropriately give great deference to the decisions of these mothers regarding adoption placement so that they are not faced with the burden of raising a child alone in adverse circumstances, with little or no support if they would rather choose an adoptive placement for their child.

Utah's adoption statutes also recognize the more contingent situation of an unwed father who may or may not take responsibility for a child, in direct contrast with what the mother experiences. Thus, Utah law appropriately requires that he act to demonstrate full commitment to the child's well-being and do so quickly. It establishes clear and strict requirements to ensure that the need for the father to take full re-

sponsibility quickly is met without infringing his constitutional right to preserve his parental opportunities. This approach has been consistently upheld by the Utah Supreme Court with the only possible exception for strict compliance being an instance where some action or inaction by the state has prevented the father from strictly complying with the law.

The law also advances the state's compelling interest in providing stable and permanent adoption placements, which require finality. Advancing this interest requires that the legal procedures for adoption preclude uncertainty as to responsibility for the child. The integrity of adoptive placements also ensures that those who provide the critical service of adoption are not deterred by fears that placements won't be permanent.

The bright lines established by Utah's adoption law carefully balance the interests of all parties. This is crucial because increasing the deference to one party can create significant burdens on the interests of others. Specifically, disregarding the adoption statutes to give unwed fathers an open-ended right to disrupt an adoptive placement chosen by the mother creates burdens for the mother, the state, prospective adoptive parents and the child who could be deprived of a permanent and stable home at an early, formative stage of life.

REASONS FOR GRANTING THE PETITION

The rule adopted by the Utah Supreme Court in this case constitutes a replacement of the exacting requirements of Utah law for an unwed father to object

to an adoptive placement of a child with a vague standard of reasonableness. This standard, the majority believes, is inferred by the language of the Indian Child Welfare Act, even though reading such a requirement into the Act would contravene the settled practice of deferring to state judgments in issues of domestic relations.

In order to appropriately assess this standard, *amici* believe this Court must carefully examine the context of Utah's adoption laws. Like the adoption laws of every other state, these laws must, of necessity, address a difficult set of circumstances and balance competing interests and demands that arise from the unique circumstances of unwed pregnancies. Considering that context, we suggest, will make clear that the State has carefully and successfully taken into consideration the realities faced by children, mothers, fathers and the state when a child is conceived outside of marriage. By contrast, a vague reasonableness standard would upset the careful balance struck by Utah law and likely undercut, rather than advance, the paramount interests of Indian children.

I. Utah's Adoption Law Reflects a Careful Balancing of the Interests of Children and Parents with the Interests of Children Treated as Paramount in the Calculus.

The Utah Legislature has developed careful and comprehensive adoption regulations that appropriately weigh the complicated realities that necessitate adoptive placements. Specifically, Utah has adopted a

comprehensive plan that appropriately balances (1) the needs of children for life, stability and permanence, (2) the needs of birth mothers for privacy and protection, (3) the due process rights of birth fathers to seize the opportunity to develop a relationship with their child, (4) the interests of prospective adoptive parents in permanent placements, and (5) the compelling interests of the State in ensuring speedy identification of the adults responsible for a child.

When a child is born to a married mother and father, the parents' formal commitment to one another provides crucial protections to the child. The Utah Supreme Court has said: "Marriage is the institution established by society for the procreation and rearing of children." *Sanchez v. L.D.S. Social Services*, 680 P.2d 753, 755 (Utah 1984). It is also the best protection of a father's relationship with the child. As this Court explained: "The most effective protection of the putative father's opportunity to develop a relationship with his child is provided by the laws that authorize formal marriage and govern its consequences." *Lehr v. Robertson*, 463 U.S. 248, 263 (1983).

In the event this protection is not in place for a child, the Utah Legislature has established laws recognizing "that the rights and interests of all parties affected by an adoption proceeding must be considered and balanced in determining what constitutional protections and processes are necessary and appropriate." Utah Code Ann. 78B-6-102(3).

A. Utah's Adoption Laws Prioritize Children's Interests.

Utah law is clear: "It is the intent and desire of the Legislature that in every adoption the best interest of the child should govern and be of foremost concern in the court's determination." Utah Code 78B-6-102(1). The realities facing children of unmarried parents are often extremely challenging.

For children who are born to unmarried parents, single parent home life is often less than ideal. Children raised by single-parents are likely to experience: more conflicts with their mothers and less monitoring by their mothers, increased family instability, early onset of puberty for girls, significantly more child poverty, more psychiatric diseases, more suicide attempts, more alcoholism, more drug abuse, more criminal behavior for boys, and higher levels of abuse. W. BRADFORD WILCOX, ET AL., WHY MARRIAGE MATTERS, THIRD EDITION: THIRTY CONCLUSIONS FROM THE SOCIAL SCIENCES at 14-15, 22-23, 28-30, 37, 40 (2011).

At best, the children may have their time divided between parents living in separate homes (like a de facto divorce). Often the romantic partner of the child's mother or a stepparent become the only second adult influence in the child's life, a situation which is, on average, not likely to yield the positive outcomes for the child that would come from a stable home headed by a married mother and father. *Id.* at 22, 27, 30, 35, 37, 40, 46 (reporting children in stepfamilies are more likely than those raised in married homes to

experience abuse, failure at school, delinquency, teenage pregnancy, incarceration, drug use, and committing crime; children in cohabiting homes are more likely to experience abuse, poor engagement in school, adolescent depression and to “report more sadness and loneliness”).

Adoption, by contrast often provides much better prospects for children. A recent large-scale study based on the reports of adults about their experience as children on a number of crucial measures of well-being, said: “it is worth noting how seldom the estimates of young-adult children who were adopted by strangers (before age 2) differ statistically from the children of still-intact biological families. They display the fewest significant differences—seven—across the 40 outcomes evaluated” in this study in comparison to other family structures such as step-family and single-parent homes. Mark Regnerus, *How Different are the Adult Children of Parents who have Same-Sex Relationships? Findings from the New Family Structures Study* 41 SOCIAL SCIENCE RESEARCH 752, 764 (2012).

Given these realities for children, while Utah’s adoption law recognizes a “compelling interest . . . in holding parents accountable for meeting the needs of children,” when the biological parents of a child cannot meet those needs, the law recognizes that “adoptive children have a right to permanence and stability in adoptive placements.” Utah Code 78B-6-102(5). This latter finding is the basis of the adoption law’s exacting requirements of unwed biological fathers

who might seek to contest an adoption placement chose by a child's mother.

As the Utah Supreme Court has explained, the protracted litigation in adoption cases in which the standard is something like "the father's diligence and sincerity in trying to establish his parental rights . . . would be especially incalculable as to the children involved. The harm caused to infants, who need stable relationships with adults for the psychological bonding necessary for their well-being and character development could be incurable." *Sanchez v. L.D.S. Social Services*, 680 P.2d 753, 755 (Utah 1984). The court also said:

The state has a strong interest in speedily identifying those persons who will assume the parental role over such children, not just to assure immediate and continued physical care but also to facilitate early and uninterrupted bonding of a child to its parents. The state must therefore have legal means to ascertain within a very short time of birth whether the biological parents (or either of them) are going to assert their constitutional rights and fulfill their corresponding responsibilities, or whether adoptive parents must be substituted. *Wells v. Children's Aid Society of Utah*, 681 P.2d 199, 203 (Utah 1984).

Children's interests also require that adoptions be "final and irrevocable wherever possible "[i]f infants

are to be spared the injury and pain of being torn from parents with whom they have begun the process of bonding.” *Id.* at 206-207.

B. Utah’s Adoption Laws Provide Essential Protections Tailored to the Unique Vulnerabilities Experienced by Unwed Mothers.

Of course, unwed mothers experience unique physical, emotional, and financial vulnerabilities as a result of pregnancy. Ideally, they would have significant support from the child’s father but this is less likely absent the commitment of marriage. The women in these situations often face heightened risks from the circumstances of conception.

It is also important to note that a woman expecting a child under these circumstances experiences built-in emotional, financial and physical consequences that an unwed father does not. As the U.S. Supreme Court has noted: “We need not be medical doctors to discern that young men and young women are not similarly situated with respect to the problems and the risks of sexual intercourse. Only women may become pregnant, and they suffer disproportionately the profound physical, emotional, and psychological consequences of sexual activity.” *Michael M. v. Superior Court*, 450 U.S. 464, 471 (1981). To use an extreme example, no father has ever died in childbirth though, tragically, some mothers do. Thus, the law is justified in giving disproportionate deference to her choices regarding adoption. If she chooses to place and the placement is disrupted, she knows she will likely to

have to bear the sole burden of care for the child, often without support from the father. The Census Bureau reports that of never married custodial parents only 44.2 percent had child support agreements or awards in 2009; of those who were due payments 51.4 percent received child support payments, 34.7 percent received all payments and 34.2 percent received none. Timothy S. Grall, *Custodial Mothers and Fathers and Their Child Support: 2009*, Current Population Reports P-60-240 at 6 Table 2 (U.S. Census Bureau, December 2011).

Utah law recognizes these realities and the needs of the mother that follow from them. The Legislature has noted: “an unmarried mother, faced with the responsibility of making crucial decisions about the future of a newborn child, is entitled to privacy, and has the right to make timely and appropriate decisions regarding her future and the future of the child, and is entitled to assurance regarding the permanence of an adoptive placement.” Utah Code 78B-6-102(5). It has also recognized “that an unmarried mother has a right of privacy with regard to her pregnancy and adoption plan, and therefore has no legal obligation to disclose the identity of an unmarried biological father prior to or during an adoption proceeding, and has no obligation to volunteer information to the court with respect to the father.” Utah Code 78B-6-102(7).

As the Utah Supreme Court has explained, a requirement “that the father of an illegitimate child be identified and personally notified before his parental right can be terminated” would “threaten the privacy interests of unwed mothers.” *Wells v. Children’s Aid*

Society of Utah, 681 P.2d 199, 207 (1984). It could also dramatically heighten the mother's vulnerability by allowing a father who is unwilling or incapable of taking full responsibility for the child to disrupt an adoption and thereby impose overwhelming psychological and financial consequences on the mother.

This is why Utah law provides such significant deference to adoption decisions of unwed mothers and requires strict compliance with laws meant to ensure full acceptance of parental responsibility (not just a desire to have a say) by unwed fathers before they can contest a mother's decision about adoption.

C. Utah's Adoption Laws Protect the Right of Unwed Fathers to Preserve Their Parental Opportunities.

An unwed father is also in a unique situation. His relationship to the child he has created is inherently more tenuous than the mother's and must usually be mediated through her. As already noted, he does not experience the physical challenges related to pregnancy and is dramatically less likely to experience the educational and emotional difficulties the mother will. His support for and relationship to the child is largely a matter of his choice unless the mother obtains a support order or agreement which, again as noted above, does not happen in a majority of instances and which he may or may not comply with. Though he cannot insist on marriage, he has an absolute ability to refrain from engaging in a sexual relationship prior to marriage and has, to some degree, assumed the risk of not doing so.

The matter of timeliness is also crucial. If the father is not going to assume full responsibility for the child and the mother would like to place the child in an adoptive home, then, as described above, the child's interests counsel expeditious placement in a permanent adoptive home so that critical bonding can take place.

The adoption statutes reflect the father's more contingent role and the need for a father who desires to take full responsibility to act quickly and decisively. The Legislature has found that "an unmarried biological father has an inchoate interest that acquires constitutional protection only when he demonstrates a timely and full commitment to the responsibilities of parenthood, both during pregnancy and upon the child's birth." Utah Code 78B-6-102(5). Further, "the state has a compelling interest in requiring unmarried biological fathers to demonstrate commitment by providing appropriate medical care and financial support and by establishing legal paternity." *Id.* "If an unmarried biological father fails to grasp the opportunities to establish a relationship with his child that are available to him, his biological parental interest may be lost entirely, or greatly diminished in constitutional significance by his failure to timely exercise it, or by his failure to strictly comply with the available legal steps to substantiate it." Utah Code 78B-6-102(6).

Since the unwed father's role is so dependent on his choice to take responsibility, the Legislature has specified that "[a]n unmarried biological father has the primary responsibility to protect his rights" and a

foundational tenet of the adoption law is that “[a]n unmarried biological father is presumed to know that the child may be adopted without his consent unless he strictly complies with the provisions of this chapter, manifests a prompt and full commitment to his parental responsibilities, and establishes paternity.” *Id.*

The Utah Supreme Court has consistently upheld adoption laws that require strict compliance with statutory measures designed to identify an unwed father and to ascertain his commitment to taking full responsibility for the child:

This court has consistently upheld the Act’s strict compliance standard as constitutionally sound. . . . We have upheld the Act’s strict compliance standard in part because an unwed father’s biological connection to his child does not automatically grant him a fundamental constitutional right to parenthood. Rather, an unwed father has a “provisional right” to parenthood, and due process requires only that an unwed father have “a meaningful chance to preserve his opportunity to develop a relationship with his child.” *Baby Girl T.*, 2012 UT 78, ¶11.

The U.S. Supreme Court has said “the rights of parents are a counterpart of the responsibilities they have assumed” *Lehr v. Robertson*, 463 U.S. 248, 257 (1983). Utah’s Supreme Court similarly noted: “It is not too harsh to require that those responsible for

bringing children into the world outside the established institution of marriage should be required either to comply with those statutes that accord them the opportunity to assert their parental rights or to yield to the method established by society in a manner best suited to promote their welfare.” *Sanchez v. L.D.S. Social Services*, 680 P.2d 753, 756 (Utah 1984). A father is absolutely free to act to protect his interests by complying with the statutory requirements: “Utah’s statutory scheme permits a father to protect himself by invoking statutory procedures before the child is relinquished for adoption.” *T.M. v. B.B.*, 2010 UT 42, ¶42.

Nor can an unwed father excuse himself from taking full responsibility to protect his opportunity to fully care for the child’s interests by blaming inaction on others. The statute is clear: “Each parent of a child conceived or born outside of marriage is responsible for his or her own actions and is not excused from strict compliance with the provisions of this chapter based upon any action, statement, or omission of the other parent or third parties.” Utah Code 78B-6-106(1). As the Utah Supreme Court has said: “If the Act does give him a meaningful chance to protect his interest, he may not complain of the termination of his interest when he fails to strictly comply with its procedures.” *Baby Girl T.*, 2012 UT 78, ¶20

This is not to say the State has unfettered power to exclude him from decisions regarding his child. The statute makes no attempt to do that. It simply provides that “a putative father is intended to be the

master of his own destiny; he may not argue constitutional unfairness where his parental rights are terminated due to his own failure to comply with the Act.” *Baby Girl T.*, 2012 UT 78, ¶25. Thus, the only exceptions the Utah Supreme Court has recognized to the requirement of strict compliance are where “the father’s failure to strictly comply with the Act” was attributable “to failures of state-controlled process.” *Id.* at ¶25. “The prior cases in which this court has found due process violations have been situations in which the putative father had no reasonable opportunity to comply with the statutory procedures through which he could protect his provisional parental rights.” *T.M. v. B.B.*, 2010 UT 42, ¶33 note 22.

D. Utah’s Adoption Laws Advance Compelling State Interests.

The State has compelling interests in adoption arising from the unique posture of adoption cases. When parents cannot or do not care for a child, the State must assume that care, either fully (as with children in the custody of the State) or partially (through provision of welfare services). Even where parents are nominally responsible (as through child support orders), the State may still play a significant role (i.e. through child support recovery). Thus, the legislature has recognized that “the state has a compelling interest in providing stable and permanent homes for adoptive children in a prompt manner, in preventing the disruption of adoptive placements, and in holding parents accountable for meeting the needs of children.” Utah Code 78B-6-102(5). The Leg-

islature has further explained: “A certain degree of finality is necessary in order to facilitate the state's compelling interest.” *Id.* As the Utah Supreme Court has noted:

The state has a strong interest in speedily identifying those persons who will assume the parental role over such children, not just to assure immediate and continued physical care but also to facilitate early and uninterrupted bonding of a child to its parents. The state must therefore have legal means to ascertain within a very short time of birth whether the biological parents (or either of them) are going to assert their constitutional rights and fulfill their corresponding responsibilities, or whether adoptive parents must be substituted. *Wells v. Children's Aid Society of Utah*, 681 P.2d 199, 203 (1984).

In a similar passage, the Kansas Supreme Court said:

States have an interest in being able to determine as early as possible in a child's life the rights, interests, and obligations of all parties, in eliminating the risk of unnecessary controversy that might impair the finality of an adoption, in encouraging adoptions, in protecting the adoption process from unnecessary controversy and complication, and in

protecting the privacy and liberty interests of the natural mother and all parties to the adoption. *Adoption of A.A.T.*, 196 P.3d 1180, 1195 (Kansas 2008).

The U.S. Supreme Court, too, has spoken of the “legitimate state interests in facilitating the adoption of young children and having the adoption proceeding completed expeditiously.” *Lehr v. Robertson*, 463 U.S. 248, 264 (1983).

Utah’s Supreme Court has explained that allowing unwed fathers who are unwilling to take full responsibility for a child to prevent an adoptive placement “would frustrate the compelling state interest in the speedy determination” of the individuals who will assume the care of the child.” *Wells v. Children’s Aid Society of Utah*, 681 P.2d 199, 207 (1984). More recently, the court has also said the State’s “compelling interest in permanent adoptions” (*Thurnwald v. A.E.*, 2007 UT 38, at ¶40) is undercut “when the Act is interpreted in ways that promote uncertainty.” *Baby Girl T.*, 2012 UT 78, ¶30.

Absolute clarity in setting out the circumstances under which an unwed father can contest a mother’s placement decision is beneficial because “[i]f the rights of unwed fathers are well defined, it will be more difficult for fathers to mount as-applied constitutional challenges to the deprivation of their rights.” *Thurnwald v. A.E.*, 2007 UT 38, at ¶40.

The State also has a compelling interest in protecting the integrity of adoption placements. If adoptive placements are commonly disrupted or if bonding

with adoptive parents is often frustrated by protracted litigation, it is conceivable that prospective adoptive parents, who provide a tremendous service to children and the community, will be hesitant to adopt. The Utah Supreme Court has made clear: “If prospective parents are to rely on the process in making themselves available for adoptions, such determinations must also be final and irrevocable.” *Wells v. Children’s Aid Society of Utah*, 681 P.2d 199, 207 (1984).

E. Utah’s Adoption Laws Appropriately Consider All Relevant Circumstances in Striking a Balance Between the Various Interests and Rights of the Parties that Would be Disturbed by Introducing Novel and Nebulous Legal Standards.

It is clear from examining the realities faced by the various parties to an adoption that the State must provide bright lines setting out the rights and responsibilities of potential participants in adoption proceedings. As noted above, Utah courts have spoken repeatedly of “compelling” (*Thurnwald v. A.E.*, 2007 UT 38, at ¶40; *Wells v. Children’s Aid Society of Utah*, 681 P.2d 199, 203 (Utah 1984)) and “strong” (*Id* at 203) interests in expeditious and permanent placements.

Careful balancing is necessary because increasing the deference to one party can create significant burdens on the interests of others. For instance, decreasing the statutory circumstances under which a father

who has demonstrated a full commitment to take responsibility for a child can get notice of a potential adoption would burden his interest in a “meaningful chance to preserve his opportunity to develop a relationship with his child.” *Baby Girl T.*, 2012 UT 78, ¶11.

Conversely, providing to unwed fathers an open-ended right to disrupt an adoptive placement chosen by the mother at any time or to protract litigation over the issue creates burdens on the mother who has a disproportionate role in caring for the child (and interfere with her privacy interests), on the state which must often supplement the mother’s efforts, on prospective adoptive parents whose relationship with the child must be carried out under a cloud of uncertainty that can affect bonding, and most importantly on the child who is deprived of a permanent and stable home at an early, formative stage of life.

As the Utah Supreme Court explains: “The state’s strong interest in immediate and secure adoptions for eligible newborns provides a sufficient justification for significant variations in the parental rights of unwed fathers, who, in contrast to mothers, are not automatically identified by virtue of their role in the process of birth.” *Wells v. Children’s Aid Society of Utah*, 681 P.2d 199, 203 (1984). In rejecting a challenge to New York’s adoption statute, the U.S. Supreme Court noted that State’s legislature “concluded that a more open-ended notice requirement would merely complicate the adoption process, threaten the privacy interests of unwed mothers, create the risk of

unnecessary controversy, and impair the desired finality of adoption decrees.” The Court went on: “Regardless of whether we would have done likewise if we were legislators instead of judges, we surely cannot characterize the State’s conclusion as arbitrary.” *Lehr v. Robertson*, 463 U.S. 248, 264 (1983).

Here, the court below is urging a new, nebulous requirement of allowing late contests to adoptive placements where “reasonable”. Such a rule would upset the careful balance of current law. To require an “open-ended” inquiry into the subjective intent of the unwed father to establish a relationship with his child, rather than relying on the clear and expeditious requirement of strict compliance with the statute is not mandated by the United States or Utah Constitutions as the cases cited above make abundantly clear.

CONCLUSION

For the foregoing reasons, *amicus* respectfully requests that the Court grant review in this case.

Respectfully submitted,

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