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 WRIT OF CERTIORARI TO THE UTAH SUPREME COURT

BRIEF OF THE ACADEMY OF ADOPTION AND ASSISTED REPRODUCTION ATTORNEYS AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF THE *AMICI CURIAE* [1]

The Academy of Adoption & Reproduction Attorneys, Inc., formerly known as the American Academy of Adoption Attorneys, Inc. (Academy or *Amicus*) is committed to improving the lives of children by advocating for the benefits and stability provided through adoption. As an organization, and through its members and committees, the Academy has lent *Amicus Curiae* assistance in worthy cases, assisted and advised the State Department on implementation of the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption and the federal Intercountry Adoption Act of 2000, participated in the legislative process culminating in the introduction of the Federal adoption tax credit, provided input into the drafting and passage of state and federal adoption legislation, and advised in the drafting of the Uniform Adoption Act. In 2012, the Academy participated in efforts that resulted in the issuance by the Association of Administrators of the Interstate Compact on the Placement of Children of

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[1] Pursuant to Sup. Ct. R. 37.2(a), counsel for all parties received notice of *amici*'s intent to file this brief. All parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Regulation 12 regarding private and independent interstate adoptions effective October 1, 2012, so that placements in safe and stable permanent homes could occur more quickly. Also in 2012, the Academy worked with Congress to make permanent the Federal adoption tax credit which was set to expire at the end of 2012. In late 2013, the Academy was instrumental in the passage by Congress of the "Accuracy for Adoptees Act," which President Obama signed into law on January 16, 2014. The Accuracy for Adoptees Act requires that a Federal Certificate of Citizenship for a child born outside of the United States reflect the child's name and date of birth as indicated on a state court order or state vital records document issued by the child's state of residence after the child has been adopted in that state, and thereby enables adoptive parents to change their child's date of birth to more accurately reflect the child's chronological age.

The Academy, because of its active involvement in the field of adoption law and practice, has an interest in the development and application of sound legal principles in this area of adoption law. The following is a list of some of the cases in which the Academy has expressed this interest, and lent assistance to courts as *Amicus Curiae* over the last 20 years: *V.L v. E.L.,* 577 U.S. _____,136 S.Ct. 1017, 194 L.Ed.2d 92; 84 USLW 3491 (U.S. March 7, 2016; *In re F.T.R.,* 833 N.W.2d 634 (Wis., July 11, 2013); *Adoptive Couple v. Baby Girl*, 570 U.S. 2552 ,133 S. Ct. 2552, 185 L. Ed. 2d 570 (US, June 25, 2013); *Adoptive Couple v. Baby Girl*, 398 S.C. 625, 731 S.E.2d 550 (S.C., July 26, 2012); *In re*

T.L.S., Slip Copy, 2012 WL 2708307, 2012 -Ohio- 3129, Ohio App. 12 Dist., July 09, 2012 (NO. CA2012-02-004); *Copeland v. Todd*, 282 Va. 183, 715 S.E.2d 11 (Va., September 16, 2011); *Arkansas Dept. of Human Services v. Cole*, 2011 Ark. 145, 380 S.W.3d 429 (Ark., April 07, 2011); *In re Adoption of Baby Girl P.*, 291 Kan. 424, 242 P.3d 1168 (Kan., October 29, 2010); *In re Adoption of G.V.,* 127 Ohio St.3d 1247, 937 N.E.2d 1285 (Ohio, October 07, 2010); *In re Adoption of P.A.C.*, 126 Ohio St.3d 236, 933 N.E.2d 236 (Ohio, July 22, 2010); *In re Adoption of G.V.,* 126 Ohio St.3d 249, 933 N.E.2d 245 (Ohio, July 22, 2010); *In re Adoption of J.A.S.*, 126 Ohio St.3d 145, 931 N.E.2d 554 (Ohio, July 15, 2010); *In re Handorf*, 485 Mich. 1052, 777 N.W.2d 130 (Mich., January 27, 2010); *In re Adoption of Baby Girl P.,* 222 P.3d 565, 2010 WL 348291, Unpublished Disposition (Kan.App., January 22, 2010); *In re Adoption of A.A.T.,* 287 Kan. 590, 196 P.3d 1180 (Kan., December 12, 2008); *In re T.S.*, Not Reported in N.E.2d, 2007 WL 3243534, 2007 -Ohio- 5900 (Ohio App. 12 Dist., November 05, 2007); *In re Marquette S.*, 301 Wis.2d 531, 734 N.W.2d 81 (Wis., June 22, 2007); *In re Adoption of B.G.J.*, 33 Kan. App.2d, 111 P.3d 651, aff'd 281 Kan. 552, 133 P.3d 1 (Kan., April 28, 2006); *In Re Adoption of B.T.*, 150 Wash.2d 409, 78 P.3d 634 (Wash., October 30, 2003); *In re Termination of Parental Rights to Thomas J.R.*, 262 Wis.2d 217, 663 N.W.2d 734 (Wis., June 20, 2003); *Moore v. Asente*, 110 S.W.3d 336 (Ky., June 12, 2003); *G.P. v. State*, 842 So.2d 1059 (Fla.App. 4 Dist., April 23, 2003); *In re Adoption of Asente*, 90 Ohio St.3d 91, 734 N.E.2d 1224 (Ohio, August 23, 2000); *In re Asente*, Not Reported in N.E.2d, 1999

WL 1073664, Ohio App. 11 Dist., October 29, 1999; *Guardianship of Zachary H.*, 73 Cal.App.4th 51, 86 Cal.Rptr.2d 7 (Cal.App. 6 Dist., May 26, 1999); *Matter of Adoption of A Child by P.F.R.*, 308 N.J.Super. 250, 705 A.2d 1233 (N.J.Super.A.D., February 20, 1998); *In re Gabriel Allen Caldwell*, 228 Mich. App. 116, 576 N.W.2d 724 (Mich. App., February 13, 1998); *Chaya S. v. Frederick Herbert L.*, 90 N.Y.2d 389, 683 N.E.2d 746, 660 N.Y.S.2d 840, 1997 N.Y. Slip Op. 05591 (N.Y., June 12, 1997); *In re Bridget R.,*41 Cal. App. 4th 1483, 49 Cal. Rptr. 2d 507 (Cal. App. 2 Dist., 1996) review denied, Cal. Sup. Ct., May 15, 1996; U.S. cert. denied; *JDS v Franks*, 182 Ariz. 81, 893 P.2d 732 (1995); *In re Baby Boy W.*, 315 S.C. 535; 446 SE2d 404 (1994); *Gibbs v. Ernst*, 647 A.2d 882, 538 Pa. 193 (Pa. 1994); *In re Clausen*, 442 Mich. 648 (1993).

SUMMARY OF THE ARGUMENT

The Utah Supreme Court's decision in this case ignores the firmly established "biology plus" template, which makes parental rights of unwed biological fathers dependent on parental responsibilities assumed, that both congressional enactments and this Court's jurisprudence have endorsed for the past sixty-eight years. This "biology plus" template has guided states to develop laws protecting the rights of non-marital fathers, mothers, and children. To determine whether an Indian unwed father had established paternity, the Utah Supreme Court applied an unprecedented federal "reasonability" standard that usurps this

Court's "biology plus" precedent. Ignoring the requirements established by Utah law for establishing paternity, the Utah Supreme Court concluded that E.T. could assert his parental rights under ICWA despite the fact that E.T. failed to comply with Utah laws governing paternity and had no more than a bare biological connection to B.B.. Such a holding is contrary to the well established "biology plus" template endorsed by this Court.

The Academy is concerned about the Utah Supreme Court's invention of an ambiguous "reasonability" standard to apply to the definition of "parent" under ICWA. The Academy urges this Court to overturn the Utah Supreme Court holding in *E.T. v. R.K.B.,* 2017 UT 59 (Utah 2017) and declare that the terms "acknowledged" and "established" as used to define parent under 25 U.S.C. § 1903(9) are terms of art that must be construed consistently with their respective state law meanings. Doing so will resolve the split in state courts decisions interpreting the ICWA definition of "parent" with respect to unwed fathers.

The "biology plus" template is firmly established in state laws and interprets terms of art consistent with the Uniform Parentage Act first written prior to ICWA. Applying the state meanings of "acknowledged" and "established to the ICWA definition of "parent" found in 25 U.S.C. 1903(9) will give men fair notice to assert their parental rights, lead to predictable results, protect the children and parents in Native American Communities, and further the policy objectives of ICWA.

The issue presented in this case—how should the term "parent," as applied to unwed biological fathers be properly defined?—appears repeatedly in adoption cases filed under ICWA. This very issue reached this Court five years ago in *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013), but this Court decided the case on other grounds, leaving unanswered the definitional question of what constitutes a "parent" under ICWA. The security of adoptive Indian children demands that this court clarify the standard for defining an unwed father under ICWA.

ARGUMENT

I. THE UTAH SUPREME COURT'S DECISION IS INCONSISTENT WITH THE "BIOLOGY PLUS" TEMPLATE THAT STATES HAVE USED TO DEFINE PATERNITY, AND WITH THIS COURT'S HOLDING IN *ADOPTIVE COUPLE V. BABY GIRL*

It is well settled that, for unwed biological fathers, establishing paternity requires more than a biological connection. Congressional child support legislation, along with a series of judicial decisions produced by this court, have laid out a "biology plus" constitutional template for states to follow to develop laws defining rights of unwed fathers commensurate with responsibilities assumed. ICWA's imprecise definition of "parent" in 25 U.S.C. § 1903(9) is consistent with this federally-developed template

and the state's expectations. As set forth below, sound reasoning supports the "biology plus" template, and the weight of stare decisis favors interpreting the present case in light of state law standards. Further, the Utah Supreme Court's deviation from the "biology plus" template simultaneously eviscerates this Court's holding in Adoptive Couple because it improperly equates the terms "parent" and "custody."

A. The Paternity Laws of the States Align With the "Biology Plus" Template Endorsed by Congressional Enactments and this Court's Jurisprudence and Should Be Applied to the Definition of "Parent" Under ICWA.

In the present case, the Utah Supreme Court made E.T. a "parent" under ICWA by overlooking E.T.'s non-compliance with Utah's law and ignoring the well-developed state and federal legal templates for establishing paternity behind it. E.T. actually had all the information necessary to assert and protect his parental rights to B.B. under Utah laws—laws enaced explicitly to protect men in E.T.'s position. To gain protection under Utah state law, however, E.T. had to take initiative and assume formal responsibilities for care, custody, and control of the child in the prescribed time limits. This is consistent with the "biology plus" template. *See* Utah Code Ann. §§ 78B-15-402; 78B-6-110; 78B-6-120; 78B-6-121; 78B-6-122. E.T. failed to take initiative despite the fact that he knew he was the father of B.B. and knew the location of Birth Mother

at all times during and after her pregnancy. Birth Mother's moving from South Dakota to Utah and ceasing communication with E.T. did not relieve him of responsibilities to support his fetus/child and establish his paternity. If anything, the estrangement gave him notice that the responsibility to assert paternity was affirmatively his.

Additionally, the Utah Supreme Court ignored the fact that this Court's holding in *Adoptive Couple* was both consistent with the "biology plus" template and made on close facts to the instant case. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013). Yet the Utah Supreme Court made only passing reference to *Adoptive Couple*, erroneously distinguishing E.T. from the *Adoptive Couple* father who was not "deceived about the existence of a child or a father who was prevented from supporting his child." *Id.* (Breyer, J., concurring); *see also E.T. v. R.K.B.,* 2017 UT 59, ¶82 (Utah 2017). Just like the *Adoptive Couple* father, E.T. was never deceived about the existence of his child. E.T. knew Birth Mother was pregnant, how advanced her pregnancy was, and that she was in Utah, but made no attempt to provide support to her or the child in Utah or establish paternity. Both E.T. and the *Adoptive Couple* father waited about four months after the births of their children "to play [their] ICWA trump cards at the eleventh hour" and assert paternity after each child was placed for adoption. *Adoptive Couple*, 133 S. Ct. at 2565.

Utah adoption laws are consistent with other state laws designed to protect birth fathers within

this federal "biology plus" template. However, the instant Utah Supreme Court holding ignored this evolved "biology plus" template in direct contravention of the Congressional intent behind ICWA. *E.T. vs. R.K.B.*, 2017 UT 59 (Utah 2017); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Quilloin v. Walcott*, 434 U.S. 246 (1978). Specifically, ICWA legislative history indicates that the ICWA definition of "parent" "was not meant to conflict" with the Supreme Court's decision in *Stanley* and not meant to create a new category of father. H.R. Rep. No. 95-1386, at 23 (1978), reprinted in 1978 U.S.C.C.A.N. 7530, 7543. Thus, the legislative history does not contemplate anything beyond the then-evolving definition of fathers that started with *Stanley*.

In *Stanley*, this Court found that the Due Process Clause required the State of Illinois to provide a fitness hearing to a non-marital father before adjudicating his children dependents of the state after their mother's death. *Stanley*, 405 U.S. at 649. The non-marital father in that case had lived with and supported these children their entire lives. *Id.* at 650, n.4. The Court's holding stood for the proposition that the Constitution would protect the interests of a non-marital father who had assumed responsibilities for child rearing.

Subsequently, this Court clarified the parameters of the *Stanley* rule. In *Quilloin v. Walcott* and *Lehr v. Robertson*, this Court denied constitutional protection to fathers who did not assert parental rights under applicable state law. In contrast, this Court granted such protection to a father who did

assert parental rights in *Caban v. Mohammed. Quilloin,* 434 U.S. 246 (1978); *Lehr v. Robertson*, 463 U.S 248 (1983); *Caban v. Mohammed*, 441 U.S. 380 (1979).

In *Quilloin*, this Court held that a father's substantive due process rights were not offended in a stepparent adoption where the putative father had neither established his paternity nor shouldered significant child rearing responsibilities. 434 U.S. at 246. This case marks the seeding of that "biology plus" template used by states today.

Conversely, in *Caban*, this Court held that a non-marital father's rights were offended where adoption was granted absent his consent. *Caban*, 441 U.S. at 394. The birth father's name appeared on the children's birth certificates, and he supported his children frequently over their lives. *Id.* at 382. Thus, this Court protected the rights of a non-marital father who had assumed parental responsibilities. "Biology plus" endured. In his dissent, Justice Stevens accurately predicted that states would revise their adoption statutes in light of the Courts' holdings in these cases. *Id.* at 417 (Stevens, J., dissenting).

In *Lehr*, this Court upheld constitutional New York's putative father registry statute, which eliminated the need to provide notice to a non-marital father who had not established his paternity nor shouldered "custodial, personal, or financial relationship" with his child. *Lehr v. Robertson*, 463 U.S. 248, 262-65 (1983). These dual *Lehr* holdings on

putative father registries and constitutional protection for responsible unwed fathers have shaped the formation of legislation and case law on non-marital father rights just as predicted by Justice Stevens. "Thirty years later, at least forty-one states report cases using the father's commitment to parenting as a standard to determine consent rights in adoption." Mary Beck, *Prenatal Abandonment: 'Horton Hatches the Egg' in the Supreme Court and Thirty-Four States*, 24 Mich. J. Gender & L. 53, 84 (2017) (quoting Brief for the Am. Acad. of Adoption Attorneys as Amicus Curiae in Support of Petitioners at 15, *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013)).

Paternity registries now provide a means for timely registered non-marital fathers to guarantee notice to themselves of an adoption or dependency action where they have not established legal paternity or otherwise constitutionally protected their interests through a financial, personal, or custodial relationship. Mary Beck, *Toward a National Putative Father Registry Database*, 25 HARV. J.L. & PUB. POL'Y 1031, 1039-42 (2002). Thirty-four states, including Utah, have putative father registries in place. *See* Utah Code Ann. §§ 78B-15-402, 78B-6-110, 78B-6-120, 78B-6-121, 78B-6-122. Additionally, 34 states have either enacted prenatal support laws or have judge-made standards of prenatal support. Mary Beck, *Prenatal Abandonment: 'Horton Hatches the Egg' in the Supreme Court and Thirty-Four States*, 24 Mich. J. Gender & L. 53, 55 (2017).

Together, registries and prenatal support laws protect biological fathers who take affirmative steps to assume responsibilities of paternity – the essence of "biology plus." *Id.*

B. The Utah Supreme Court's Decision Evicerates this Court's Holding in *Adoptive Couple*

The Utah Supreme Court made this case about whether E.T. qualifies as a parent under ICWA. As this Court established in *Adoptive Couple*, however, E.T.'s status as a "parent" does not matter. Because E.T., like the father in *Adoptive Couple*, never had custody of B.B. and was not thwarted by mother in obtaining custody, E.T. does not qualify to take advantage of the heightened parental protections under § 1912(d).

The Utah Supreme Court, however, erroneously decided that, "as a parent, [E.T.] had *legal custody* of the Child." *E.T. v. R.K.B.*, 2017 UT 59, ¶78 (Utah 2017) (emphasis added). The Utah Supreme Court's holding in the present case eviscerates this Court's *Adoptive Couple* holding because it erroneously conflated legal custody with the bare acknowledgement of paternity. According to the Utah Supreme Court, E.T. is deemed a "parent," and *Adoptive Couple* is irrelevant to him—and to the countless putative fathers of Indian children who are ever deemed to be a "parent."

The Utah Supreme Court's great leap from the definition of "parent" under ICWA, to such a "parent"

being automatically invested with legal custody is ill-considered. According to the Utah Supreme Court:

> Utah law appears to presume that a parent automatically enjoys legal custody, stating that the "fundamental liberty interest of a parent concerning the care, custody, and management of the parent's child is recognized, protected, and does not cease to exist simply because a parent may fail to be a model parent or because the parent's child is placed in the temporary custody of the state . . . .

E.T. v. R.K.B., 2017 UT 59, ¶ 81 (*quoting* Utah Code § 78A-6-503(4)). The Academy is concerned that the Utah Supreme Court's attribution of legal custodial rights to fathers who have not assumed parental responsibilities will wreak havoc with the "biology plus" template adopted by the states and approved by this Court. Neither the paternity registry nor the prenatal support laws, as discussed above, provide that that legal "custody" springs from the acknowledgment or establishment of paternity alone, as held by the Utah Supreme Court. The Utah Supreme Court's interpretation of ICWA thus reverses the legal presumption that rights follow from assumed responsibilities and endorses a newfound presumption that rights precede assumed responsibilities, and biology supersedes.

II. ICWA TERMS "ACKNOWLEDGED" AND "ESTABLISHED" ARE TERMS OF ART THAT SHOULD BE ASSIGNED MEANING BY THE LAWS OF THE STATES.

A well settled standard for making determinations of paternity under state law exists. ICWA recognizes that state courts exercise jurisdiction over adoption proceedings involving Indian children. 25 U.S.C. §§ 1903(6), 1912(b)-(d), 1913(b), (d), 1914, 1915(a), (e), 1916(a), 1922-23. In doing so, ICWA seeks not to usurp state laws that establish paternity in favor of a federal standard, but instead to yield to the laws of the state so long as "minimum state standards" are satisfied. Paternity has long been governed by state law, and courts asked to resolve whether paternity has been "acknowledged" or "established" in cases implicating ICWA have repeatedly looked to state laws in making such determinations. The decision of the Utah Supreme Court abandons this practice in favor of an unpredictable and unintended federal standard that fails to offer an objective definition of the terms "acknowledged" or "established".

State courts are already divided on the issue of whether state law controls the question whether a birth father has "acknowledged" or "established" paternity. Specifically, the supreme courts of New Jersey and Oklahoma have held that ICWA does not create parental rights for biological fathers when state law does not otherwise recognize those rights. *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925, 932 (N.J. 1988); *In re Adoption of Baby Boy D.*, 742 P.2d 1059, 1064 (Okla. 1985), *overruled*

on other grounds in In re Baby Boy L., 103 P.3d 1099 (Okla. 2004)). Intermediate appellate courts in California and Texas have ruled similarly. *See In re Daniel M.*, 1 Cal. Rptr. 3d 897, 900 (Cal. App. 4th 2003); *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 172 (Tex. App. 1995).

The Alaska Supreme Court has held that ICWA requires that biological fathers be given certain rights *regardless* of state law. *Bruce L. v. W.E.*, 247 P.3d 966, 979 (Alaska 2011). The South Carolina Supreme Court likewise signaled it will follow the same rule with its decision in *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 559–60 (S.C. 2012), *reversed on other grounds*, 133 S. Ct. 2552 (2013). The Arizona Court of Appeals has held the same. *Jared P. v. Glade T.*, 209 P.3d 157, 160, 162 (Ariz. Ct. App. 2009). Agreeing with these courts, the Utah Supreme Court held that in determining paternity in cases involving Indian children, courts must apply a previously unknown federal "reasonableness" standard. *E.T. v. R.K.B.*, 2017 UT 59 (Utah 2017). And agreeing with these courts—but going even further still—it held that a "parent" so defined is thus magically endowed with legal "custody," making the holding of *Adoptive Couple* a nullity.

This Court now has the opportunity to clarify that courts should defer to state laws in determining whether a biological father has "acknowledged or established" paternity under ICWA, and resolve the split that exists among state courts.

Recently this Court noted the existence of a historic preference for allowing states to determine

family law matters. *United States v. Windsor*, 570 U.S. 744, 133 S. Ct. 2675, 2691 (2013). This Court has also noted a reasonable need for Constitutional limitations on state authority in family law. *Stanley v. Illinois*, 405 U.S. 645, 648-49 (1972);*Obergefell v. Hodges*, 135 S. Ct. 2584, 2627 (2015). It is up to this Court to balance the important and competing interests of the states and the federal government. The instant case involves such a balancing act, as ICWA was created to appropriately balance the best interests of Indian children and the integrity of Native American people with a uniform application of the law and deference to the fifty states in domestic matters. *See* 25 U.S.C. § 1901–02, 1914. Although ICWA was created to promote uniformity in the law and maintain the integrity of Native American people, state sovereignty remains preserved as an integral part of ICWA. As demonstrated by a multitude of references to the application of state law in ICWA proceedings, state courts have the power to adjudicate family law proceedings. 25 U.S.C. §§ 1903(6), 1911, 1912(b)-(d), 1913(b), (d), 1914, 1915(a), (e), 1916(a), 1922-23. Thus, Congress did not intend to completely erode deference to states through its passage of ICWA and instead relies heavily on state law in ICWA's implementation.

For these reasons this Court should grant certiorari and clarify that state law definitions of the terms "acknowledged" and "established" should be applied to the ICWA definition of "parent". Doing so would create a uniform, reliable, consistent, and respected legal theory by which state courts can

adjudicate adoption proceedings with uncertain paternity of Indian children.

A. It is Well-Established that when a Statute is Silent on the Meaning of Terms with Settled Common Law Meanings, then Congress Intended that such Common Law Meaning be Applied.

The terms used in ICWA's definition of parent, 25 U.S.C. § 1903(9), "acknowledged' or 'established," should be viewed by this Court as terms of art with well-established meanings assigned by the states. This Court has consistently held that "[w]here Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *NLRB v. Amax Coal Co., Div of Amax*, 453 U.S. 322, 329 (1981). In *NLRB v. Amax Coal*, this Court interpreted a statute that required assets from union welfare funds to be "held in trust" and "for the sole and exclusive benefit of the employees ... and their families and dependents . . . ." *Id.* Because the phrase "held in trust" was undefined by statute, but had a well settled meaning in common law, this Court construed the phrase in accordance with its state common law meaning. *Id.* In *Nationwide Mut. Ins. Co. v. Darden*, this Court applied the same rule of statutory construction to the ERISA definition of "employee." 503 U.S. 318, 319, (1992). This Court found the definition of "employee" in the ERISA was so broad that assigning any other meaning besides

that suggested by state common law would subvert well settled employment law principles. *Id.* In *Field v. Mans*, this Court again applied a traditional common law understanding to the term "actual fraud" when a debtor statute failed to define the term. 516 U.S. 59, 69-74 (1995).

The terms "acknowledged" or "established" are not defined by 25 U.S.C. § 1903(9), and have accumulated settled meaning amongst the states. Because ICWA does not indicate otherwise, "acknowledged" and "established" are precisely the types of terms that Congress intended state common law meaning to apply to. Granting deference to state common law meanings of "acknowledged" or "established" will promote consistency in their application and will eliminate the possibility of arbitrary interpretation. Only this Court can compel the states to follow such a well-reasoned approach.

B. State Law Definitions for 'Acknowledge' and 'Establish' are Superior Definitions Because they are Well-Established, Uniform, and Predictable.

Following this Court's decision in *Stanley*, the Uniform Law Commission, developed a detailed and uniform procedure allowing for unwed biological fathers to establish paternity, known as the Uniform Parentage Act. Unif. Parentage Act (1973). The Uniform Parentage Act was promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in 1973, five years before the enactment of ICWA in 1978. *Id.* The 1973 version of the Uniform Parentage Act was adopted by nineteen

states, and provided that a man is presumed to be the natural father of a child if "he has acknowledged his paternity of the child in writing filed with the [appropriate court or Vital Statistics Bureau]."[2] *Id.* Eleven states, including Utah, have adopted the Uniform Parentage Act as revised in 2000 and amended in 2002. Unif. Parentage Act (2000) § 101, Refs & Annos, 9B U.L.A. 295 (2017). The Uniform Parentage Act of 2000 defines "acknowledged father" as a man who has established a father child relationship by both parties signing an acknowledgement of paternity.[3] Unif. Parentage Act (2000) §§ 101(1), 301 9B U.L.A. 295 (2017).

The "acknowledgment" of paternity is a recognized procedure that is consistent across the eleven states that have adopted the Uniform

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[2]Uniform Law Commission, *Why States Should Adopt UPA*, http://www.uniformlaws.org/Narrative.aspx?title=Why%20States%20Should%20Adopt%20UPA (last visited Feb. 1, 2018) ("The Uniform Parentage Act, promulgated in 1973 and adopted in 19 states, was revised in 2000, and amended in 2002.).

[3] An acknowledgement of paternity must be in a record, signed by the mother and the man seeking to establish paternity, state whether a presumed father exists, state that the child does not have another acknowledged or adjudicated father, state whether there has been genetic testing and the results of said testing, and state that the signatories understand that this acknowledgement is equivalent to an adjudication of paternity. Parentage Act Unif. Parentage Act (2000) § 302(a), 9B U.L.A. 295 (2017).

Parentage Act in its 2000 version. *See generally* Unif. Parentage Act §§ 302-313. States that have not adopted the Uniform Parentage Act of 2000 have outlined relatively uniform procedures for acknowledging paternity consistent with the acknowledgment affidavit with which the Secretary is charged to develop.[4]

Indeed, the United States Code directs the Secretary of the Department of Public Health and Welfare to "specify the minimum requirements of an affidavit to be used for the voluntary acknowledgment of paternity which shall include the social security number of each parent and, after consultation with the States, other common elements as determined by such designee." 42 U.S.C. § 652(a)(7). This voluntary affidavit of paternity exists in all states as such forms are a condition of receiving federal funds. Mary Beck, *Prenatal Abandonment: 'Horton Hatches the Egg' in the*

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[4] For example, in Missouri, an affidavit acknowledging paternity must conform to minimum federal standards as set out in 42 U.S.C. Section 652(a)(7). Mo. Ann. Stat. § 192.016 (West 2016). In Florida paternity is acknowledged by a putative father filing an affidavit signed by the himself and the mother attesting that the putative father is the biological father, this must be witness by at least two other people and fraud in the attestation is punishable by perjury crimes. Fla. Stat. Ann. § 742.10 (West 2017). In any state acknowledging paternity is a stylized process that requires meeting certain procedural requirements.

Supreme Court, and Thirty-Four States, 24 MICH. J. GENDER & L. 53, 67–68 (2017)..

Consequently, "acknowledge" and "establish" are terms of art that have specific legal meanings that any person familiar with state family law would recognize. Given this Court's historical preference for interpreting undefined terms of art as consistent with their transferred common law meaning, this Court should grant certiorari and provide the clarity that the Indian and larger Indian adoption community have been waiting for—that the common law definitions of 'acknowledged' and 'established' retained by the states provide a uniform and predictable standard for conferring parental rights to putative fathers under ICWA.

III. THE UTAH SUPREME COURT'S PROPOSED "FEDERAL REASONABILITY" STANDARD FOR DETERMINING PATERNITY IS UNWORKABLE, ABROGATES THE POLICY GOALS UNDERLYING ICWA, AND FOSTERS UNPREDICTABLE RESULTS

This Court previously clarified the applicability of ICWA provisions where an unwed Indian father seeks to intervene in the adoption proceedings to which his biological child is subject. *See Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013). In that case, this Court assumed, without deciding, that the Biological Father met the statutory definition of "parent," and thus bypassed the issue of what it means to "acknowledge" or "establish" paternity under ICWA. *Id.* at 2560. This unresolved question is of grave importance given that fifty-two percent of

multiracial Americans self-identify as having Indian heritage, approximately 65.8 percent of Indian children are born out of wedlock and thus have no presumed father, and eighty-three percent of single custodial parents are women. Joyce A. Martin, et al., *Births: Final Data for 2015, Nat'l Vital Statistics Rep.*, Jan. 5, 2017 at 44; *see also* PEW RES. CTR., *Am. Indian & White, But Not 'Multiracial,'* (June 11, 2015), http://www.pewresearch.org/fact-tank/2015/06/11/american-indian-and-white-but-not-multiracial.

Unless and until this Court provides clarity, the question of how to determine the paternity of an Indian child will continue to come before state courts by the sheer number of persons affected, and state courts will continue to split over the answers.

In the present case, the Utah Supreme Court invented a "reasonability" standard to determine if Birth Father established or acknowledged paternity. *E.T. v. R.K.B.,* 2017 UT 59, ¶ 71 (Utah 2017). This "reasonability" standard treats Indian fathers differently than non-Indian fathers without any justification, other than that they are of Native American heritage. Utah's "bare acknowledgement" standard creates an unreasonably low bar for acknowledging paternity and is so undefined as to be unworkable. Bare acknowledgment does not provide a basis for states to hold fathers accountable for the care, custody, and support of children. Utah's creation of a "reasonability" standard applicable only to ICWA fathers is contrary to the right of states to define parentage uniformly for the purposes of determining paternity under state laws. The Utah

Supreme Court's "reasonability" standard abrogates the policy goals of ICWA because it promotes instability in Indian families by permitting unwed fathers to "establish" paternity without assuming accountability and will yield unpredictable results in future ICWA litigation.

In addition to preserving the integrity of Indian families, one of the underlying goals of ICWA is to protect the best interest of Indian children. 25 U.S.C. § 1902. The best interests of Indian children cannot be protected unless there exists a clear standard by which an unwed biological father must establish or acknowledge paternity. Without a clear standard, unwed Indian biological fathers will be granted parental rights while simultaneoulsy avoiding the assumption of parental responsibilities. This will compromise the best interests of Indian children. For example, to establish paternity under Utah law a father is required to file a paternity (parentage) action in a district court in Utah; complete and file a "Notice of Commencement of Paternity Proceeding" form with the Utah State Office of Vital Records; file an affidavit in the paternity action stating that he is able to have full custody, support the child, and pay for the expenses of the mother's pregnancy and childbirth; and offer to pay and actually have paid a fair amount of the expenses incurred in connection with the mother's pregnancy and childbirth. *See* Utah Code Ann. §§ 78B-6-110(3). E.T. took none of the actions required of him under Utah law to successfully establish paternity of B.B. Therefore, the Utah Supreme Court decision unjustifiably relieves E.T. of the well-defined responsibilities

assigned to him by Utah law and abandons the necessary concepts of consistency and accountability necessary to promote the best interests of Indian children.

Supplanting an adoptive family for a father who dodges his parental responsibilities under state law could adversely impact thousands of Indian children subject to adoption proceedings annually, as well as prospective adoptive parents. Chaos would reign to the detriment of Indian children if men, who are among the fifty-two percent of Americans who self-report as having Indian heritage, could invoke ICWA's heightened parental protections on the basis of unwritten Cheyenne Tribal law without incurring concomitant parental responsibilities. Some twenty-two percent of American Indians and Alaska Natives live on reservations or other trust lands. U.S. DEPT. OF HEALTH & HUMAN SERVS. OFFICE OF MINORITY HEALTH, *Profile: American Indian/Alaska Native*, https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=3&lvlid=62 (last visited Jan. 24, 2018). Sixty percent of the aforementioned live in metropolitan areas, where the "bare acknowledgement" standard rooted in tribal law is certainly ineffective to protect Native American fathers and children.

Using tribal law to determine if paternity is "acknowledged" or "established" was effective at stopping B.B.'s adoption, but it is ineffective beyond that. Unlike state laws, tribal laws are often not

published. For example, the law of the Cheyenne River Sioux, the tribe to which E.T. belongs, is difficult to access as it is not published online.[5] Instead, to access the law of the Cheyenne River Sioux, one must contact the tribal library. *Id.* The failure to publically announce or publish tribal law diminishes its accessibility, its transparency, and its ability to give notice to those that might access it or be subject to it. As such, it does not prevent the arbitrary exercise of power that this Academy urges this Court to avoid.

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[5] Nat'l Indian Law Library, Cheyenne River Sioux Tribe—Tribal Code https://www.narf.org/nill/codes/cheyenne_river_sioux/ (last visited, Jan. 27, 2018) ("The tribe has not given permission for the full-text document to be made available online.").

CONCLUSION

This Court should grant review of the Utah Supreme Court's holding in *E.T. v. R.K.B* to recognize the "biology plus" template utilized by states to define the rights of unwed fathers, to endorse the states' rights to apply of their own paternity laws to 25 U.S.C. §1903(9), to reaffirm its decision in *Adoptive Couple*, and to resolve the persistent confusion in state courts over which unwed fathers are entitled to ICWA protections so as to advance the legislative intent of ICWA in prioritizing Indian children's and tribes best interests.

For the foregoing reasons and those stated in the petition, this Court should issue a writ of certiorari.

Respectfully submitted,

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