No. 17-942

In The
Supreme Court of the United States

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

Petitioners,

v.

E.T.,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Utah

BRIEF OF *AMICI CURIAE* UTAH ADOPTION COUNCIL SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the Indian Child Welfare Act, 25 U.S.C. § 1903(9) requires an unwed father to show his paternity has been "acknowledged or established" under state or tribal law or under a federal "reasonability" standard.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

STATUTES

OTHER AUTHORITIES

INTERESTS OF *AMICI*[1]

Utah Adoption Council is a non-profit, all-volunteer organization of adoptees, birth parents, adoptive parents, agencies, lawyers and community groups in Utah supportive of adoption.

SUMMARY OF THE ARGUMENT

Domestic relations are almost the exclusive province of the states. Congress did not intend to end that deference by creating a federal standard to determine whether an unwed father had "acknowledged or established" his paternity.

Unlike state law standards for determining whether an unwed father's paternity has been acknowledged or established, an ambiguous federal standard of reasonableness fails to secure the best interest of the child. To secure the best interest of a child, a determination that the child can be adopted must be final as well as immediate. Without such clear rules, children, especially Indian children, are at risk of significant psychological attachment issues, neglect, or abuse.

Further, employing a federal standard upsets the delicate balance between the rights of states, children, birth mothers, adoptive families, and unwed fathers

[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.

that must exist in a system for adoption to ensure all parties receive the due process to which they are entitled before they can be deprived of their liberty interests. State systems, including that used by Utah, meet this standard. Additionally, although the Utah Supreme Court only intended its federal reasonability standard to apply to Indian Child Welfare Act ("ICWA") adoptions, because information is not always available in the adoption context, potential adoptive families need to consider this new standard in every adoption.

REASONS FOR GRANTING THE PETITION

The Indian Child Welfare Act, 25 U.S.C. § 1901, et seq. protects Indian children, families and tribes from the breakup of Indian families by the removal of their children to be placed in non-Indian environments. *See* 25 U.S.C. § 1901. ICWA was not intended to protect unmarried fathers who fail to take responsibility for the child's future, *see Lehr v. Robertson*, 403 U.S. 248 (1983), and defines "parent" so as to exclude "the unwed father where paternity has not been acknowledged or established." *See* 25 U.S.C. § 1903(9). In *Adoption of B.B.*, 2017 UT 59, the Utah Supreme Court analyzed whether an unmarried biological father was a "parent" under ICWA and determined that Congress intended a federal standard to determine whether an unwed father had "acknowledged or established" paternity. *See, e.g.*, *B.B.*, 2017 UT 59 at ¶ 51. The Utah Supreme Court went on to conclude that since Congress had not

explicitly described the standard, it intended a "reasonability" standard to apply. *Id.* at ¶ 71.

I. Domestic Relations are the Exclusive Province of the States

The Utah Supreme Court has created a previously unknown federal reasonability standard to be applied when determining whether an Indian Birth Father has "established" or "acknowledged" paternity. *See B.B.*, 2017 UT 59 at ¶¶ 51-72. There has never been, nor should there be, a federal standard for paternity, as matters of domestic relations have "long been regarded as a virtually exclusive province of the States." *See U.S. v. Windsor*, ___ U.S. ___, 133 S. Ct. 2675, 2691 (2013), *quoting Sosna v. Iowa*, 419 U.S. 393 (1975). In 1890, this court held, "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." *In re Burrus*, 136 U.S. 586, 593-594 (1890). So long as the domestic laws enacted by states respect a person's constitutional rights, the Federal Government has consistently deferred to state legislation and the states' policy decisions regarding the family. *Windsor*, 133 S. Ct. at 2691, *Lehr*, 403 U.S. at 256.

These state policies, as enacted by legislation, determine almost every aspect of family law, including who may marry, under what conditions parties may divorce, child support, spousal support, and emancipation to name a few. *See Lehr*, 403 U.S. at 256. The *Windsor* court held, "Consistent with this allocation of

authority, the Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations." *Windsor*, 133 S. Ct. at 2691; *see also Lehr*, 403 U.S. at 257.

Adoption, paternity, and the termination of parental rights are the domestic relations at issue in the Petition, specifically whether an unwed father's paternity has been "acknowledged or established" pursuant to ICWA. *See* 25 U.S.C. § 1903(9). In enacting ICWA, Congress recognized that the federal government was stepping into an area of law historically legislated by the states. In his dissent in *Adoption of B.B.*, Justice Lee noted that "ICWA [did] not oust the states of that traditional area of their authority," but rather "mandated some minimum standards that state adoption schemes must satisfy." *B.B.*, 2017 UT 59 at ¶¶ 159-60.

ICWA was enacted to function in conjunction with state or tribal law, not to create a federal standard. When ICWA was enacted in 1978, the terms "acknowledged" and "established" were legal terms of art with a settled meaning that incorporated legal rules applicable in each state. ICWA defined "parent" not to "include the unwed father where paternity has not been acknowledged or established," 25 U.S.C. § 1903(9), against the tapestry of state statutes that allowed an unwed father to secure parental rights, including emerging putative father registries. *See B.B.*, 2017 UT 59 at ¶¶ 170-71, nn. 35-36. The majority in *Adoption of B.B.* erroneously interpreted *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989) to require the application of a federal standard, yet *Holyfield*

itself states, "Congress sometimes intends that a statutory term be given content by the application of state law." *Id.* at 43. The requirements for acknowledging or establishing paternity as legislated by each state have been the basis for determining whether an unwed father had acknowledged or established paternity under ICWA. ICWA was not intended to *create* a standard; it does not define the process by which acknowledgement or establishment of paternity must occur or the elements of making such a showing. Rather, ICWA grants rights to a "parent," including an unwed father if he has established them.

Had Congress intended to legislate a uniform federal standard and forego the application of state law, Congress would have laid out specific requirements for establishing paternity or further defined those words rather than leaving the matter to be resolved on a case-by-case basis in state court. Instead, Congress used settled terms of art to indicate the application of state law.

After nearly 40 years of state law determining whether paternity had been established, the judicial creation of a federal standard in *Adoption of B.B.*, and the disregard for the state's historical purview over adoption law, erodes long-standing principles of federalism and cannot be upheld. By assuming an implied federal reasonableness standard, the Utah Supreme Court created new standards where none had been dictated by Congress or this Court. The Utah Supreme Court's application of a federal standard of reasonableness unlawfully injected federal control over an area

intentionally left to the States. The absence of a standard does not give license for an appellate court to create a standard where none has been articulated and is not required by constitutional considerations. *See Lehr*, 403 U.S. at 257 (State law determines the final outcome unless the Federal Constitution supersedes). By reversing *In Adoption of B.B.*, the U.S. Supreme Court will reaffirm the principle that domestic relations matters remain within the purview of the state and confirm that while ICWA sets forth minimum standards, it does so within the existing frameworks established by the States.

II. To ensure that the best interest of the child is preserved and the compelling interests of the state are met, potential adoptive families must be able to easily determine whether a child can be adopted.

Another reason certiorari is appropriate in this case is because the Utah Supreme Court departed from established rules that are definitive and unambiguous in connection with the establishment of parental rights and adoption. *See generally*, Utah Code § 78B-6-101, *et seq.* (the Utah Adoption Act) and Utah Code § 78B-15-101 *et seq.* (the Utah Uniform Parentage Act). By endorsing a "federal standard of reasonableness," *B.B.*, 2017 UT 59 at ¶ 71, the Court set aside these rules and instead adopted a standard that has rarely, if ever, been applied to parental rights. Indeed, the Court's application of this standard to the facts of the case was bereft of citation to precedent or

persuasive authority. *Id.*, ¶ 74. Justice Lee, in dissent, characterized this as, "a make-it-up-as-we-go standard," or "an admission that the court has no standard." *Id.* ¶ 194.

Adoption requires definitive and unambiguous rules to be effective. The Utah legislature made findings to this effect in connection with the Utah Adoption Act.[2] Although these findings recognize that "the best interests of the child should govern and be of foremost concern in the court's determination," they also conclude 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(1) and (5)(a). Further, "adoptive children have a right to permanence and stability in adoptive placements." *Id.*, § 78B-6-102(5)(c).

The reasoning behind such findings is self-evident. Adoption involves the creation and termination of parental rights, which includes the custody and welfare of children. If such rights are not definitive, it presents the possibility that a child will not receive appropriate care. Children require consistent care and attention and the absence thereof presents a significant risk of the child suffering neglect, injury, psychological attachment issues or other harm. Without clear standards,

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[2] References here are primarily to Utah law, because of the origin of this case. Similar arguments could be made with respect to the law of other States or jurisdictions.

children may be subject to insecurity, abuse and uncertainty. The absence of definitive rules presents a situation in which a child may be moved from one home to another, or back and forth. Such circumstances are not in a child's best interests. *See Paryzek v. Paryzek*, 776 P.2d 78, 81-82 (Utah Ct. App. 1989) ("[P]roviding a stable home for a child and avoiding 'ping pong' custody awards are critical factors in custody disputes[.]").

Lehr v. Robertson, 463 U.S. 248 (1983) addressed a New York statute that allowed a child to be adopted without notice to or consent from an unmarried biological father who failed to register with a paternity registry. The Court noted legitimate reasons that justified New York's clear adoption rules, such as avoiding complication of the adoption process, securing the privacy interests of unwed mothers, avoiding unnecessary controversy, obtaining the desired finality of adoption decrees, *id.* at 249, facilitating the adoption of young children and completing adoption proceedings expeditiously, *id.* at 265.

The Utah Supreme Court itself has often described why clear rules are important in the adoption context. For example, in *Wells v. Children's Aid Society of Utah*, 681 P.2d 199 (Utah 1984), that court reasoned:

> 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.

To serve its purpose for the welfare of the child, a determination that a child can be adopted must be final as well as immediate. Thus, in rejecting a mother's attempt to recover her child about eight months after she had given it up for adoption, this Court declared:

> It is and should be the policy of the law to so operate as to encourage the finding of suitable homes and parents for children in that need. It is obvious that persons who might be willing to accept a child for adoption will be more reluctant to do so if a consenting parent is permitted to arbitrarily charge [change] her mind and revoke the consent, and thus desolate the plan of the adoptive parents and bring to naught all of their time, effort, expense and emotional involvement. . . . A moment's reflection will reveal that to the degree that such commitments are given respect and solidarity, so they can be relied upon, persons desiring children will be willing to accept and give them homes. Conversely, to the degree that such commitments can easily be withdrawn and the adoptive plan thus destroyed, such persons will tend to be discouraged from doing so.

Id. at 203 (emphasis added), *quoting In re Adoption of F-*, 26 Utah 2d 255, 262, 488 P.2d 130, 134 (1971).

In *Sanchez v. L.D.S. Social Services*, 680 P.2d 753 (1984), the Utah Supreme Court was faced with a challenge to a statute that required that unmarried biological fathers register their intent to assert paternity over a child with the "Utah department of social services . . . prior to the date the [] child is relinquished or placed with an agency licensed to provide adoption services." *Id.* at 754. Although the father had visited the mother in the hospital and assumed that they would live together, he did not seek to register until the day after the mother had relinquished the child for adoption. *Id.* at 755. The Court rejected his challenge, determining, "It is of no constitutional importance that [the father] came close to complying with the statute. Because of the nature of subject matter dealt with by the statute, a firm cutoff date is reasonable, if not essential." *Id.* The Court added that its failure to endorse a firm cutoff would, "promote litigation in a number of adoption cases."

> The damage done by the actual and potential disruption of the adoption system by protracted litigation of such cases 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.

Id.

Sanchez highlights the issue at hand. If the rules governing adoption and the establishment of parental rights are uncertain, it increases the likelihood of

litigation on those issues. Such litigation is frequently protracted, interfering with the attachment between parents and children or the risk of disruption of a parent-child relationship. Such litigation is not in the best interest of the child. Failure of attachment and disruption commonly results in harm to the children involved. As such, it is essential that there be definitive and unambiguous standards in connection with adoption and the establishment of parental rights.

The "federal standard of reasonableness" does not present a definitive or unambiguous standard. There is not sufficient precedent or authority to allow its application in a manner that provides permanence and stability in adoptive placements. Further, it presents the possibility that a state or tribal standard used for an initial determination on adoption is cast aside when the fact emerges that a child is an Indian Child. *See, e.g.*, *State ex rel. P.F.*, 2017 UT App 159, ¶ 5 (child's status as possible Indian Child arose only after State took custody). A court could be faced with a situation in which an initial determination of parental rights, based on state law, had to be reversed when it determined that the federal standard of reasonableness applied.

In order to allow for definitive and unambiguous standards, this Court should, therefore, grant certiorari for review of the Utah Supreme Court's decision.

III. A federal standard for determining paternity is inconsistent with Utah's compelling interest to facilitate adoptions and the constitutional rights of other parties.

Generally, a birth mother chooses to place her child for adoption because she has concerns about the father. Birth mothers who choose adoption almost always have concluded, based on their knowledge of the birth father, that he is unlikely to be fully committed to the responsibilities of parenthood, whether because he is abusive or merely inattentive. Birth mothers often express to members of the Utah Adoption Council their strong desire to avoid interaction with the biological father. The Utah legislature recognizes this aversion and has found that a birth mother 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." *See* Utah Code § 78B-6-102(7). Thus, adoptive parents, adoption agencies, and other parties often do not know who the birth father is or whether he has an interest in coming forward to participate in the rearing of his child. Further, sometimes this aversion is so strong that a birth mother makes false or incomplete statements to biological fathers, agencies, adoptive parents, or the courts to avoid contact with the father.

Indeed, this very case, according to the Utah Supreme Court, arose from such an event. In the very first paragraph of the opinion, the court called the situation "septic" and explained:

> Birth Mother admitted to having perpetuated a fraud on the district court and suborning perjury from her brother-in-law, all in an effort to keep Birth Father from intervening in the proceedings. . . .

B.B., 2017 UT 59 at ¶ 1. Many Utah adoption cases arise out of false or incomplete statements made by birth mothers. *See, e.g.*, *O'Dea v. Olea*, 217 P.3d 704, 2009 UT 46, ¶¶ 42-45; *J.S. v. P.K. (In re I.K.)*, 220 P.3d 464, 2009 UT 70, ¶¶ 2-3; *Osborne v. Adoption Ctr. of Choice*, 70 P.3d 58, 2003 UT 15, ¶¶ 3-4; *Swayne v. L.D.S. Soc. Servs*., 795 P.2d 637, 639 (Utah 1990); *In re Adoption of Baby Boy Doe*, 717 P.2d 686, 687 (Utah 1986); *Sanchez v. L.D.S. Soc. Servs.*, 680 P.2d 753, 754 (Utah 1984).

This lack of information caused by non-disclosure or false statements increases the already significant conflict between the rights of parties involved in an adoption. The Utah legislature considered this problem in the context of the state's "compelling interests" related to adoption, *see* Utah Code § 78B-6-102(5)(a), *see also Lehr*, 403 U.S. at 265 (state has legitimate interest in "facilitating the adoption of young children and having the adoption proceeding completed expeditiously"), and carefully created a statutory regime that would balance the parties' interests in the event of fraud and misrepresentation. It found –

> The Legislature finds no practical way to remove all risk of fraud or misrepresentation in adoption proceedings, and has provided a method for absolute protection of an

> unmarried biological father's rights by compliance with the provisions of this chapter. In balancing the rights and interests of the state, and of all parties affected by fraud, specifically the child, the adoptive parents, and the unmarried biological father, the Legislature has determined that the unmarried biological father is in the best position to prevent or ameliorate the effects of fraud and that, therefore, the burden of fraud shall be borne by him.

Utah Code § 78B-6-102(6)(d). Although each state's statutory regime for determining how a biological father acknowledges or establishes paternity is unique, each reaches a balance between the rights of the parties involved, particularly when the parties that undertake to obtain the best interest of the child are not aware of all the facts.

In enacting ICWA, Congress did not consider this issue. It did not craft a regime intended to balance the constitutionally protected rights and interests of each party. It did not create "a method of absolute protection" of a biological father's interest. *See* Utah Code § 78B-6-102(6)(d). It did not consider "infinite variety" of "intangible fibers" that connect parents and children. *See Lehr*, 403 U.S. at 256.

The Utah Supreme Court acknowledged that "ICWA does not explicitly define the procedures and timing required," and concluded that, because the statute is silent on the matter, a "reasonability standard" applies. *B.B.*, 2017 UT 59 at ¶ 71. This conclusion

approaches absurdity. The fact the statute is silent on the matter is not evidence that Congress intended a "reasonability standard" to apply, but that Congress did not intend to regulate the area. By creating a standard that does not balance the rights of the parties in the event of misrepresentation, the Utah Supreme Court did not even consider the well-established rights of other parties to adoption. This failure to consider the rights of other parties presages the rights that will be trampled upon as courts seek to apply the "reasonability standard." The "reasonability standard" shifts all rights to the putative father and away from other parties with constitutionally protected interests.

The "reasonability standard" thus creates harmful, real-world consequences because it fails to establish the balance obtained by the statutory schemes of Utah and the other states. Further, despite the Utah legislature's right to legislate in the area, the "reasonability standard" will apply to every adoption because those involved risk making significant sacrifices of time, effort, expense and emotional involvement only to have their plan desolated by the discovery that an unspecified "reasonability standard" applies.

A. Well-developed state law procedures, such as paternity registries, protect a biological father if a birth mother does not identify him or misidentifies him.

The Utah Supreme Court's decision is irreconcilably at odds with this Court's previous observation that

it is unreasonable to interpret ICWA as allowing "a biological Indian father [to] abandon his child in utero and refuse any support for the birth mother – perhaps contributing to the mother's decision to put the child up for adoption – and then could play his ICWA trump card at the eleventh hour to override the mother's decision and the child's best interests." *Couple v. Baby Girl*, ___ U.S. ___, 133 S. Ct. 2552, 2565 (2013). Despite this admonishment, the facts of this case show the Utah Supreme Court's unbalanced approach can and will lead to such unreasonable and detrimental end results. *Compare id. with B.B.*, 2017 UT 59 at ¶¶ 5-9, 64-66.

Unlike the Utah Supreme Court's "reasonability standard," the states have established substantive, detailed processes by which unwed biological fathers can assert their parental rights if they wish, as well as protect against the unreasonable result feared in *Windsor*. Most states, including Utah, employ a putative father registry of the kind that was found constitutional in *Lehr v. Robertson*. These registries provide a biological father with an opportunity to provide notice that he intends to assert his parental rights. *See*, *e.g.*, Mary Beck, *Toward A National Putative Father Registry Database*, 25 Harv. J.L. & Pub. Pol'y 1031, 1080 (2002) (providing overview of putative father registries in numerous states). This regime allows a putative father to assert a parental interest in a child even if the birth mother does not identify him, or misidentifies someone else as the child's biological father. Thus, a putative father is provided the opportunity to assert a parental

interest in the child even if his identity is not known to the court, the adoption agency or the adoptive parents, even if the birth mother has concealed or lied to others about his identity.

The Utah Adoption Act is a good example of this regime. Although it recognizes the possibility of misrepresentation or fraud cannot be eliminated, a putative father registry ameliorates that risk by allowing the birth father a means by which he can assert a legal interest in a child *even when* other interested parties are unaware of his existence at the time of placement. *See* Utah Code § 78B-6-102(6)(d).

The Utah legislature also finds 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)(a). These articulated state interests, as well as the protected liberty interests of the mother, child and the adoptive parents to permanency and stability in their relationship, are undermined if ICWA creates an exception to state law requirements for putative fathers.

Even states that do not have formal putative father registries have developed requirements to address situations in which the birth mother does not accurately identify a putative father. For example, the South Dakota Supreme Court encountered a factual scenario highly analogous to the case at issue here,

but, in marked contrast to Utah's Supreme Court, relied upon well-established rules of its state's substantive law to decide the case. *See*, *generally*, *Matter of Baby Boy K.*, 546 N.W.2d 86 (S.D. 1996). Moreover, unlike the Utah Supreme Court, the South Dakota Supreme Court determined that allowing state law to determine whether a biological father has acknowledged or established paternity would not result in highly randomized decisions because the procedures in every state must comport with the Fourteenth Amendment's Due Process Clause. *See id.* at 87-101 (detailed analysis concluding that application of South Dakota's state law did not violate biological father's Fourteenth Amendment Due Process rights where he learned of child one month after birth and filed paternity action soon thereafter).

In sum, these state-created processes ensure that an unwed father who does not come forward to assert parental rights during the pregnancy or shortly after the birth of a newborn child placed for adoption will be unable to disrupt an adoptive placement, thereby placing the child at risk of severe, life-long psychological damage resulting from removal from the only parents the child has ever known. As such, if the Court finds that Section 1903(9) incorporates State law for when a putative biological father has "acknowledged or established" his paternity, it would ensure that the unreasonable result *Windsor* highlighted would not come to pass in ICWA matters.

B. A federal standard for paternity in ICWA cases affects every adoption.

Because of the investment of time, effort, expense and emotional involvement, adoptive parents are understandably reluctant to become involved in an adoption that could be disrupted. *See, e.g.*, *In re Adoption of F-*, 26 Utah 2d 255, 262, 488 P.2d 130, 134 (1971). The "reasonability standard" concocted by the Utah Supreme Court makes all adoptions unreasonably risky because birth mothers may not disclose (or may not even know) that their child is an "Indian child." *See* 25 U.S.C. § 1903(4).

Adoption professionals, including lawyers, agencies, and judges, would have to counsel adoptive families that there is a legal risk, even if state law procedures have been fully complied with, that the unmarried biological father may qualify under ICWA and a different and undefined standard will apply, one that will be very expensive to litigate. This risk will be especially great when the birth mother has exercised her privacy right not to disclose the father. *See, e.g.*, Utah Code § 78B-6-102(7). This risk will exist even if the birth mother has identified the birth father as a non-Indian because the birth mother may be wrong or may be presenting a false father as happened in *B.B. See B.B.*, 2017 UT 59 at ¶ 6-9. There will be a risk even if a man comes forward, claims to be the father, and consents to the adoption. There is a risk even if the birth mother is married to a non-Indian, because the father may be another man who is an Indian. There is virtually no adoption in which the adoptive family can be sufficiently

satisfied that the "reasonability standard" does not apply.

And it is reasonable for any potential adoptive family to determine that it is not worth the risk of having to litigate that undefined, vague, impossible standard. If the Utah Supreme Court accurately interpreted ICWA, then there will be a chilling effect on adoptions across the country. This was not the intent of ICWA.

CONCLUSION

The Court should grant certiorari to correct the Utah Supreme Court's misinterpretation of ICWA.

Respectfully submitted,

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