No. 14-1106

IN THE

Supreme Court of the United States

WILLIAM E. BOLDEN,
Petitioner,

—v.—

JOHN AND JANE DOE,
Respondents.

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

BRIEF *AMICUS CURIAE* FOR FIVE CONCERNED FAMILY LAW PROFESSORS IN SUPPORT OF THE PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

Amici are law professors who specialize in family law and who have previously published on, or have interest in, the issue of a putative father's objection rights to adoption proceedings under the *Lehr v. Robertson* standard. Amici have no personal stake in the outcome of this case, but have an interest in seeing that family laws develop in a way that protects the interests of biological mothers and fathers.

SUMMARY OF THE ARGUMENT

This Court's decision in *Lehr v. Robertson* provided fathers the opportunity to insert themselves into their children's lives after demonstrating biology and a commitment to the child. 463 U.S. 248, 261 (1983). While this precedent is controlling for the adoptions of older children, states have little guidance concerning the creation of newborn adoption procedures. This lack of newborn adoption precedent allows states to create burdensome procedural requirements exclusive to

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* affirm that no counsel for a party authored this brief in whole or in part, that no counsel or a party made a monetary contribution intended to the preparation or submission of this brief and no person other than *amicus curiae*, their members, or their counsels made a monetary contribution to its preparation or submission.

Pursuant to Supreme Court Rule 37.2, each party has been given 10-day notice and consented to the filing of this brief, and copies of the consents are on file with the Clerk of the Court.

fathers, steeped in outdated familial stereotypes, that violate Equal Protection and hinders fathers from developing a relationship with their children. Thus, this Court should provide standards to govern newborn adoption proceedings, while putting the archaic stereotypes of mothers and fathers to rest. By doing so, states will have the tools to create newborn adoption procedures that protect the interests of everyone involved without violating Equal Protection.

ARGUMENT

I. UTAH'S AFFIDAVIT REQUIREMENT IMPOSES BURDENS ON UNWED FATHERS THAT ARE NOT IMPOSED ON MOTHERS AND THAT EXCEED *LEHR*'S STANDARD, OPERATING TO THE DETRIMENT OF THE RELATIONSHIP BETWEEN A FATHER AND HIS CHILD.

Utah imposes a unique and unconstitutional requirement on unwed fathers before they are vested with the right to object to their child's adoption that is not imposed on mothers, violating Equal Protection. Like many states, Utah requires unwed fathers to file a paternity petition before intervening in an adoption, stating that he is able to seek custody of the child and agreeing to a court order of child support and payment of expenses incurred in connection with the mother's pregnancy and the child's birth. But Utah places extraordinary procedural hurdles on unwed fathers who are attempting to intervene in an adoption, such as by

requiring an unwed father to submit an affidavit detailing his lifetime plan of care for the child. UTAH CODE ANN. § 78B-6-121(3)(b) (West 2014). These extra procedural hurdles violate equal protection.

Utah's additional requirements go beyond what is required for a father to seize his opportunity interest as a parent under *Lehr*, and denies a father his *Stanley v. Illinois* presumption of being a fit parent unless proven otherwise. *Lehr*, 463 U.S at 261 (requiring a father to demonstrate biology and a commitment to the child to seize his opportunity interest); *Stanley v. Illinois*, 405 U.S. 645, 657–58 (1972). Furthermore, the burdens of filing the affidavit and of proving child support disproportionally burden low-income fathers. The Utah Supreme Court justifies this violation of equal protection, and departure from this Court's precedent, by relying on outdated stereotypes of the familial roles of mothers and fathers.

The present case illustrates the unfortunate consequences when states, such as Utah, go beyond the *Lehr* standard by creating burdensome procedural requirements that fathers must meet before the State grants standing to object to adoption proceedings. Here, Mr. Bolden demonstrated his commitment to parenthood two weeks before his child was born by filing a petition in the district court to determine paternity, custody, parent time, and child support. Pet. Writ. Cert. at 5a, *Bolden v. Doe*, No. 14-1106 (2014). Due to his attorney's failure to inform him of the affidavit requirement, however, Mr. Bolden failed to satisfy all the requirements of UTAH CODE ANN. § 78(B)-6-121(3) (West 2014) and

subsequently was never granted standing to object to the adoption of his child. Pet. Writ. Cert. at 6a–8a.

This Court has frequently noted the importance of a father coming forward to participate in the child rearing process. *See Caban v. Mohammed*, 441 U.S. 380, 392 (1979). To foster that participation, this Court held that where the unwed father demonstrates a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child, his interest in having personal contact with his child acquires substantial protection under the Due Process Clause. *Lehr*, 463 U.S. at 250, 261 (involving the adoption of a two year old child). The *Lehr* Court further elaborated that a biological relationship alone does not create a strongly protected interest, but rather offers the natural father an opportunity to develop a relationship with his child. *Id.* at 261. All parents, including unwed fathers, who seize the opportunity to demonstrate a commitment to their child, enjoy the presumption that they are fit parents and entitled to custody unless proven unfit. *Stanley*, 405 U.S. at 657–58 (involving an unwed father's objection to his children becoming wards of the State); *see also Troxel v. Granville*, 530 U.S. 57, 68 (2000) (noting that "there is a presumption that fit parents act in the best interest of their children," providing no reason for the State to further question the ability of that parent). When the child is a newborn, such as in this case, it is difficult for an unwed father to prove commitment by coming forward and participating in the rearing of the child.

Thus, a unwed father coming forth and filing for custody of his newborn should be sufficient to prove that one is an interested father under *Lehr*, granting the father the right to object to an adoption proceeding and, upon seizing the objection opportunity, the presumption of being a fit parent unless proven otherwise. *See Lehr,* 463 U.S. at 250–51; *Stanley*, 405 U.S. at 657–58. Utah's affidavit requirement, however, exceeds the *Lehr* standard by requiring a unwed father to present a detailed affidavit to the Court before obtaining his standing to object to an adoption, when filing petition for custody should be sufficient to obtain standing to object and participate in adoption proceedings even if his success in the objection requires him to later demonstrate fitness if challenged. UTAH CODE ANN. § 78B-6-121(3)(b) (West 2014). This requirement also removes the presumption of fitness from unwed fathers because the child care plan essentially requires the father to prove he is a fit parent well before the father is even allowed to intervene in the adoption proceeding.

State adoption laws such as Utah's place harsh burdens on unwed fathers, especially those of low-income, by establishing procedural barriers that severely impede unwed fathers' opportunities to develop relationships with their children. Mr. Bolden's case, however, is exceptional in that he had the time and resources to hire an attorney, but even his attorney was not familiar enough with the extraordinary procedures. In many cases, the unwed father involved will have a low income and will not have the same access to counsel that would afford him the opportunity to object to his child's adoption.

In this regard, Utah requires the father to submit a detailed affidavit, pay child support, and pay pregnancy expenses conditions parental interest on economic status, making it nearly impossible for unwed, low income fathers to exercise their right to participate in the adoption proceeding. Meanwhile, the mother is exempted from similar procedures because she is capable of showing her commitment to the child "[b]y electing to carry the child to term." Pet. Writ. Cert. at 38a.

Utah's affidavit requirement also serves no rational basis for determining whether a father has standing to object to an adoption proceeding because it focuses on the father's ability to care for the child himself, which has nothing to do with the more basic interest of ensuring the child has a good home with the adoptive family. Rather, Utah's affidavit requirement takes a father who has passed the *Lehr* test—or has not had a meaningful opportunity to even take the *Lehr* test—and denies him his presumption of being a fit parent entitled to custody unless proven otherwise. Thus, denying certiorari will have a widespread and deleterious impact on low-income fathers, adversely impacting their ability to build relationships with their children, which this Court has often sought to encourage. *See Caban*, 441 U.S. at 392.

II. THERE IS A LACK OF PRECEDENT GOVERNING NEWBORN ADOPTIONS, CAUSING STATES TO CREATE THEIR OWN STANDARDS THAT ARE NOT COMPATIBLE WITH LEHR.

Granting certiorari to examine the *Lehr, Caban,* and *Stanley* line of precedent within this context of a newborn adoption will provide states with much needed guidance on crafting statutes that govern newborn adoptions. The guiding precedent for states is *Lehr,* which involved the adoption of a two year old child. *Lehr*, 463 U.S. at 250. The Court's other cases involving unwed fathers' rights to object to adoptions involve even older children. *See Caban,* 441 U.S. at 392 (involving the adoption of two children, ages six and four); *Quilloin v. Wallcott*, 434 U.S. 246, 249 (1978) (involving the adoption of an eleven year old). Thus, this Court has left open the question of how to establish when unwed fathers have rights regarding newborns. By granting certiorari, this Court has the opportunity to define whether filing for custody meets the minimum standards under *Lehr* for unwed fathers to seize their opportunity interest. Given the frequency of newborn adoptions, this question is becoming critically important, and states have been left with crafting their own answers. This has led to a split among the states, with some states, such as Utah, offering extreme provisions that impede low-income fathers' opportunity to develop a relationship with their children.

A. A Number Of States Have Created Less Burdensome Approaches Than Utah For An Unwed Father To Object To Adoption Proceedings And Seek Custody Of His Child.

These statutes provide examples of states that have removed unnecessary obstacles impeding unwed fathers, especially those of low income, from obtaining the necessary right to object to an adoption and claim custody of his child, while still being consistent with the *Lehr* standard and the parent's fitness presumption. *See Lehr,* 463 U.S. at 261; *Stanley*, 405 U.S. at 657–58.

Michigan's approach to the determination of an unwed father's rights is less burdensome than Utah. Once an unwed father files a verified notice of intent to claim paternity, he is then considered a presumed father. MICH. COMP. LAWS ANN. § 710.33(1)–(2) (West 2015). Once given the status of a presumed father, he is entitled to notice and standing in any hearing involving the child, including any hearing involving the termination of paternal rights and adoption proceedings. *Id.* Moreover, Michigan provides separate hearings in order to better balance the interests of the biological mother, father, and the State. Here, Michigan closely conforms to the *Lehr* standard, while also maintaining the presumption of a father's fitness.

In Wyoming and Maryland, low-income unwed fathers have a wider breadth of opportunity to establish paternity through presumption. In those states, if a presumed father is known, he will

automatically have the right to object to adoption proceedings. MD. CODE ANN., FAM. LAW § 5-338 (West 2014); WYO. STAT. ANN. § 1-22-109 (West 2014). If the father is unknown at the time of the mother's relinquishment, the state will conduct a reasonable effort to locate him and, if found, he will be presumed and have the right to object. *Id.*

Compared to other states, Utah's Adoption Act is extreme and interferes heavily with a unwed father's ability to build a relationship with his child. Thus, granting certiorari will provide extreme states with more guidance on crafting statutes that provide greater protection to the interest of unwed fathers.

III. UTAH'S ADOPTION LAW IS IMPERMISSIBLY BASED ON ANTIQUATED GENDER STEREOTYPES REGARDING THE CAPACITY OF UNWED MEN AND WOMEN AS PARENTS.

Utah's standard hinders, and often eliminates, a unwed father's opportunity to establish a relationship with his child and justifies it by relying on impermissible gender stereotypes regarding a man's capacity as a father. Specifically, Utah's requirement that men demonstrate their commitment to parenthood is based on the notion that unwed fathers are unreliable parents. Meanwhile, the statute does not impose a similar obligation on unwed mothers, finding biology alone sufficient to justify granting them presumptive parental rights. By conditioning paternal rights on the ability to pay child support, Utah discriminates

against fathers on the basis of sex. The State requires that fathers conform to a stereotypical breadwinning role, rather than allowing fathers to fulfill their parenting role by demonstrating a willingness and ability to care for their children. The State makes financial support a prerequisite to exercising parental rights for unwed fathers, but not for unwed mothers. This Court has expressly stated that state statutes involving gender classifications, such as Utah's, are subject to greater scrutiny.

In *Craig v. Boren*, this Court noted that statutory classifications between males and females are subject to intermediate scrutiny. 429 U.S. 190, 197 (1976). Under intermediate scrutiny, gender classifications "must serve important governmental objectives and must be substantially related to achievement of those objectives. *Id.* at 197-98. If a State seeks to defend a gender-based government action, it must demonstrate an "exceedingly persuasive justification" for that action. *U.S. v. Virginia*, 518 U.S. 515, 531 (1996). The Supreme Court of Utah relies on *Nguyen v. I.N.S.* to argue that the scrutiny need not be as great as *Craig* or *Virginia* because the Utah Adoption Act only places a minimal imposition on fathers. 533 U.S. 53, 70, (2001); Pet. Writ. Cert. at 43a. This argument is unprecedented and unpersuasive. Moreover, the policy considerations that underpinned the Court's decision in *Nguyen* are not present in the instant case. *Nguyen* involved American fathers living far apart from foreign-born children, who often lacked the opportunity to create a relationship with their children. 533 U.S. at 57, 61.

The Utah Adoption Act, however, directly implicates fathers who have already shown an interest in establishing paternity and caring for their children. Thus, the Supreme Court of Utah did not analyze the Adoption Act under the proper level of scrutiny.

Not only did the Supreme Court of Utah misapply the intermediate scrutiny test for the gender based classifications within the Utah Adoption Act, but it also ignored the fact that the Act is based on impermissible and outdated gender stereotypes. Pet. Writ. Cert. at 49a. While the Act does not explicitly mention these stereotypes, a careful reading of Utah's adoption law reveals those assumptions at play. Justice Nehring's dissenting opinion accurately identifies the gender stereotypes underlying Utah's affidavit requirement: Unwed fathers, as opposed to unwed mothers, are uninterested in their offspring and are ill-suited or incompetent caregivers. *Id.* 69a.

As will be discussed below, the assumptions motivating Utah's affidavit requirement regarding parental roles are entirely outdated. Traditionally, the maternal role was to act as the mother-caretaker for the home and family, including the primary care of children, while the paternal role was that of the breadwinner. These traditional roles have evolved. The maternal role has expanded, placing greater emphasis on education and career goals as well as the traditional caretaking role. In this same regard, the traditional role of fathers has expanded to include a similar balance between childrearing, and other forms of familial caregiving, and career goals. *See Nevada Dep't of Human Res. v. Hibbs*, 538 U.S.

721, 736 (2003) ("Because employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave"); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 652 (1975) (noting that a father, just as much as a mother, has a constitutional right for the care, custody, and management of his children).

Thus, in modern day, an unwed father is just as capable of providing support and care for his child. Bolstered by social science statistics supporting the roles of modern-day fathers and mothers, legal scholarship has questioned the application of laws based on outdated conceptions of men and women in the sphere of parenthood. Thus, this Court should grant certiorari to examine Utah's law in light of the modern view of the respective roles of mothers and fathers.

A. Assumptions Regarding Parental Roles Are Outdated.

In his dissent, Justice Nehring argued that the majority opinion supports a discriminatory statute relying on assumptions "about the innate characteristics of men and women" that social science and legal scholarship has shown to be faulty. Pet. Writ. Cert. at 73a. The majority turns to the biology of motherhood to advance the finding that a mother is more "committed to the best interest of her child" than a father. *Id.* 85a. As Justice Nehring argues, however, both the "biological reality" of the mother's presence at birth and the fact that "a father need not be present at birth" do not reflect the emotions, intentions, or commitment of either

parent. *Id.* The following statistics and studies support this assertion. Section A.1 presents statistics showing the changing role of mothers, the changing role of fathers, data supporting the qualifications of unwed fathers, and data showing that neither mothers nor fathers are innately better suited as parents. Section A.2 presents legal scholarship echoing these statistics, proving that biology does not predetermine parental suitability, these norms are constructs of society, and that policy reinforces these norms.

1. Recent statistics disprove the assumptions behind the majority's reasoning.

Studies and statistics show that the traditional roles of mothers and fathers have converged, proving that biology does not dictate parental roles. In recent decades, the roles of fathers have changed to include characteristics formerly assigned to the traditional maternal role. To begin with, both single fathers and stay-at-home fathers are much more common than in the past. The National Responsible Fatherhood Clearinghouse estimates that, as of 2013, two million of the 70.1 million fathers in America are single fathers, comprising seventeen percent of custodial single parents in America. *See Dad Stats*, NAT'L RESPONSIBLE FATHERHOOD CLEARINGHOUSE, https://www.fatherhood.gov/library/dad-stats (last visited Feb. 6, 2015). Of these, one-third of the single fathers were never married. *Id.* Of the married fathers, an estimated 214,000 were stay-at-home dads who "remained out of the labor force for at least

one year primarily . . . [to] care for their family while their wives work outside the home." *Id.* A spring 2011 study similarly showed that eighteen percent of preschoolers were "regularly cared for by their father during their mother's working hours." *Id.* Ultimately, fathers are taking care of the home and spending much more time with their children than they did in the past. *See* Gretchen Livingston, *The Rise of Single Fathers*, PEW RESEARCH CENTER SOCIAL & DEMOGRAPHIC TRENDS (JULY 2, 2013), http://www.pewsocialtrends.org/2013/07/02/the-rise-of-single-fathers/.

These trends apply to unwed fathers. Research shows that the majority of unwed fathers both desire and exhibit involvement in the lives of their children. *See* Christina Norland, *Father Involvement, Maternal Health Behavior and Infant Health*, FRAGILE FAMILIES RESEARCH BRIEF, 1 (Jan. 2001), http://www.fragilefamilies.princeton.edu/briefs/researchbrief5.pdf (noting ninety percent of unmarried fathers living apart from the mother, one hundred percent of unmarried fathers living with the mother, and ninety six percent of unmarried fathers who were romantic with the mother, but not living with them, reported that they were planning on staying involved in the child's life). For example, 99.8 percent of unmarried fathers interviewed shortly after the birth of their children reported that they wanted to be involved in their child's life. *Dispelling Myths About Unmarried Fathers*, FRAGILE FAMILIES RESEARCH BRIEF, 2 (May 2000), http://www.fragilefamilies.princeton.edu/briefs/resea

rchbrief1.pdf. Seventy-five percent of mothers interviewed affirmed that the father came to visit the child in the hospital, giving concrete evidence to his desire to be in the child's life. *Id.* These reports were even higher (ninety-one percent) from couples living together at the time of the child's birth. *Id.* Studies have also found that "70% of nonmarital fathers were intensely involved in the life of at least one of their children." Clare Huntington, *Postmarital Family Law: A Legal Structure For Nonmarital Families*, 67 STAN. L. REV. 167, 190 (2015). This can be compared to the twelve hours per week that married mothers typically spend on child care, and the seven hours a week that married fathers typically spend on childcare. *Id.* at 181 n. 62.

Unwed fathers also exhibit involvement in the form of financial support. For example, eighty-one percent of mothers surveyed by the Fragile Families and Child Wellbeing Study reported that the father voluntarily provided financial support during the pregnancy. *Dispelling Myths About Unmarried Fathers*, *supra*.

Studies also prove that neither mothers nor fathers possess innate characteristics that make one a better parent than the other. A study comparing single mothers and single fathers showed no marked difference between their ability to effectively parent. Jeff Grabmeier, *Single Mothers, Fathers Equally Successful at Raising Children*, THE OH. ST. U. RES. NEWS, http://researchnews.osu.edu/archive/singpar.htm (last visited Apr. 6, 2015). Thus, biology and gender

do not determine the ability or fitness of a parent. As additional support, scholarship indicates that social conditioning is a large factor in determining gender roles for men and women. *See* Nancy Levit, *Feminism for Men: Legal Ideology and the Construction of Maleness*, 43 UCLA L. REV. 1037, 1098 ("the conceptions of appropriate social roles for men and women are deeply embedded in society"). These societal gender types "create and maintain occupational segregation by sex, inhibit women's upward mobility, limit women's earning power, and shunt men away from domestic roles." *Id.* at 1099.

These exhibitions of support and involvement, coupled with only 0.2 percent of new unwed fathers indicating a desire to not be involved in their children's lives, shows that the stereotypes advanced by the majority opinion about fathers' abilities or attitudes regarding childcare are inaccurate to both married and unwed fathers. *See Dispelling Myths About Unmarried Fathers*, *supra*.

Finally, by treating unwed fathers as reluctant or ineffective caregivers, the Utah Adoption Act and similar laws reinforces women's primary responsibility for childrearing, ultimately perpetuating injurious perceptions of both women and men – that women do not participate in the workplace, and that men's contribution to families is limited to bread-winning._As this Court recognized in *Hibbs*, "[s]tereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. 538 U.S. at 736. By reinforcing these

stereotypes in the employment context, women are repeatedly forced to continue assuming the primary familial caregiver role, fostering "employer's stereotypical views about women's commitment to work and their value as employees." *Id.* Thus, statutes such as the Utah Adoption Act that are impermissibly based on outdated stereotypes are harmful to the interests of both mothers and unwed fathers.

2. Scholars and states are shifting away from the outdated traditional view of parental roles.

State courts, such as those in Oklahoma and Louisiana, are beginning to recognize the opportunity interest of unwed biological fathers. *See* Laura Oren, *The Paradox of Unmarried Fathers and the Constitution: Biology 'Plus' Defines Relationships; Biology Alone Safeguards the Public Fisc.*, 11 WM. & MARY J. WOMEN & L. 47, 113–17 (2004) (noting that Oklahoma created a law providing for a preadoption hearing with notice given to all putative fathers, and that Louisiana allowed for a putative father to retain his objection right if notice is defective).

Legal scholarship also shows a shift from the traditional view of mothers' and fathers' roles. Professor Nancy Dowd analyzes and presents social barriers to men's involvement in parenting. *See, e.g.*, Nancy Dowd, *Fatherhood and Equality: Reconfiguring Masculinities*, 45 SUFFOLK U. L. REV. 1047, 1049–51, 1059–67 (2012). These include norms

about masculinity, such as the concept that a "family man" historically was not one who spent time with his family, but one who was the breadwinner instead. *Id.* at 1060. This echoes the research of Coontz, and supports Justice Nehring's dissenting position that it is social constructs and norms, not biological predeterminism, that contributes to lower numbers of stay-at-home fathers than the respective number of mothers. Professor Dowd's scholarship also focuses on how policy reinforces these norms. *Id.* at 1067–73. While these policies are arguably anti-family and non-gendered, Professor Dowd argues that the wage discrimination affecting women (and therefore, mothers) turns these gender-neutral policies into gendered policies which reinforce the "gendered pattern" of childcare. *Id.* at 1067–69.

The work of Professor Laura Oren casts further doubt onto the relevance of gender within the Utah Adoption Act standard. *See* Oren, *The Paradox of Unmarried Fathers and the Constitution: Biology 'Plus' Defines Relationships; Biology Alone Safeguards the Public Fisc.*, *supra*; Laura Oren, *Thwarted Fathers or Pop-Up Pops? How to Determine When Putative Fathers Can Block the Adoption of Newborn Children*, 40 FAM. L.Q. 153 (2006). Professor Oren questions and criticizes the "biology equals destiny" mindset influencing perceptions of gendered parental roles, as well as the policy influenced by these perceptions. *See* Laura Oren, *Honor Thy Mother?: The Supreme Court's Jurisprudence of Motherhood*, 17 HASTINGS WOMEN'S L.J. 187, 187 (2006).

Despite the surmounting statistics and scholarship, the Utah Supreme Court, along with other states that go beyond the *Lehr* standard, continue to perpetuate outdated stereotypes. By perpetuating these archaic notions of familiar roles, states such as Utah harms mothers and fathers, but especially unwed, low-income fathers who actively seek a relationship with their children. This Court should grant certiorari to finally put these outdated gender stereotypes to rest, just as it articulated in *Hibbs* and *Weinberger*. 538 U.S. at 736; 420 U.S. at 652.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari to review the Utah's Adoption Act to provide states with much needed guidance in refining their newborn baby adoption procedures in a matter that is compatible with both *Lehr* and the evolved views of the respective roles of mothers and fathers.

Respectfully submitted,

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* The views expressed in this brief are those of the individual signatories and not those of the institutions with which they are affiliated.