No. _____

In The

Supreme Court of the United States

MARCUS PETERSON,

Petitioner,

v.

ALEX and CYNTHIA JACKSON,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of Kansas

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Is a mother's fraud on a father relevant when a court determines whether the father's parental rights have been properly terminated in an adoption proceeding?

II. Are the Kansas adoption statutes unconstitutional when applied by a court in a manner that provides an unwed biological father no legal remedy after the court terminates his parental rights based on fraudulent behavior by a biological mother and he presents the court with undisputed evidence of the mother's fraud and his paternity in a timely fashion?

PARTIES TO THE PROCEEDINGS

The Petitioner is Marcus Peterson, a resident of the state of New York, referred to as M.P. in the proceedings below. He is the biological father of A.A.T.

The Respondents are Alex and Cynthia Jackson, residents of the state of Kansas, referred to as the adoptive parents in the proceedings below.

A.A.T. is the minor child who is the subject of this adoption.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

PETITION FOR WRIT OF CERTIORARI

M.P. respectfully petitions this Court for writ of certiorari to review the judgment of the Kansas Supreme Court in this case.

OPINIONS BELOW

The judgment of the District Court of Sedgwick County, Kansas, denied the father's Verified Petition to Set Aside the Adoption after a bench trial on March 26, 2007. Father filed a timely appeal to the Kansas Supreme Court, which affirmed the District Court on December 12, 2008. The Kansas Supreme Court's opinion of December 12, 2008, is reported at 287 Kan. 590 and at 196 P.3d 1180 (2008).

JURISDICTION

Appellant invokes this Court's jurisdiction over *In the Matter of the Adoption of A.A.T.* because the final judgment of the highest court of Kansas was rendered December 12, 2008. 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV, § 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Kan. Stat. Ann. § 59-2136. Relinquishment and adoption; proceedings to terminate parental rights

(a) The provisions of this section shall apply where a relinquishment or consent to an adoption has not been obtained from a parent and K.S.A. 59-2124 and 59-2129, and amendments thereto, state that the necessity of a parent's relinquishment or consent can be determined under this section.

(b) Insofar as practicable, the provisions of this section applicable to the father also shall apply to the mother and those applicable to the mother also shall apply to the father.

. . .

(e) Except as provided in subsection (d), if a mother desires to relinquish or consents to the

adoption of such mother's child, a petition shall be filed in the district court to terminate the parental rights of the father, unless the father's relationship to the child has been previously terminated or determined not to exist by a court. The petition may be filed by the mother, the petitioner for adoption, the person or agency having custody of the child or the agency to which the child has been or is to be relinquished. Where appropriate, the request to terminate parental rights may be contained in a petition for adoption. If the request to terminate parental rights is not filed in connection with an adoption proceeding, venue shall be in the county in which the child, the mother or the presumed or alleged father resides or is found. In an effort to identify the father, the court shall determine by deposition, affidavit or hearing, the following:

(1) Whether there is a presumed father under K.S.A. 38-1114 and amendments thereto;

(2) whether there is a father whose relationship to the child has been determined by a court;

(3) whether there is a father as to whom the child is a legitimate child under prior law of this state or under the law of another jurisdiction;

(4) whether the mother was cohabitating with a man at the time of conception or birth of the child;

(5) whether the mother has received support payments or promises of support with

respect to the child or in connection with such mother's pregnancy; and

(6) whether any man has formally or informally acknowledged or declared such man's possible paternity of the child. If the father is identified to the satisfaction of the court, or if more than one man is identified as a possible father, each shall be given notice of the proceeding in accordance with subsection (f).

(f) Notice of the proceeding shall be given to every person identified as the father or a possible father by personal service, certified mail return receipt requested or in any other manner the court may direct. Proof of notice shall be filed with the court before the petition or request is heard.

(g) If, after the inquiry, the court is unable to identify the father or any possible father and no person has appeared claiming to be the father and claiming custodial rights, the court shall enter an order terminating the unknown father's parental rights with reference to the child without regard to subsection (h). If any person identified as the father or possible father of the child fails to appear or, if appearing, fails to claim custodial rights, such person's parental rights with reference to the child shall be terminated without regard to subsection (h).

(h) When a father or alleged father appears and asserts parental rights, the court shall determine parentage, if necessary pursuant to the Kansas parentage act. If a father desires but is

financially unable to employ an attorney, the court shall appoint an attorney for the father. Thereafter, the court may order that parental rights be terminated, upon a finding by clear and convincing evidence, of any of the following:

(1) The father abandoned or neglected the child after having knowledge of the child's birth;

(2) the father is unfit as a parent or incapable of giving consent;

(3) the father has made no reasonable efforts to support or communicate with the child after having knowledge of the child's birth;

(4) the father, after having knowledge of the pregnancy, failed without reasonable cause to provide support for the mother during the six months prior to the child's birth;

(5) the father abandoned the mother after having knowledge of the pregnancy;

(6) the birth of the child was the result of rape of the mother; or

(7) the father has failed or refused to assume the duties of a parent for two consecutive years next preceding the filing of the petition.

In making a finding under this subsection, the court may disregard incidental visitations, contacts, communications or contributions. In determining whether the father has failed or refused to assume

the duties of a parent for two consecutive years next preceding the filing of the petition for adoption, there shall be a rebuttable presumption that if the father, after having knowledge of the child's birth, has knowingly failed to provide a substantial portion of the child support as required by judicial decree, when financially able to do so, for a period of two years next preceding the filing of the petition for adoption, then such father has failed or refused to assume the duties of a parent.

. . .

Kan. Stat. Ann. § 59-2212. Hearings and rules of evidence

Trials and hearings in probate proceedings shall be by the court unless otherwise provided by law. The determination of any issue of fact or controverted matter on the hearing of any probate proceedings shall be in accordance with the rules of evidence provided for civil cases by the code of civil procedure, except as provided in the care and treatment act for mentally ill persons and the act for obtaining a guardian or conservator, or both.

Kan. Stat. Ann. § 60-260. Relief from judgment or order

(a) Clerical mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court

orders. During the pendency of an appeal, such mistakes may be so corrected before the record on appeal is filed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. On motion and upon such terms as are just, the court may relieve a party or said party's legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under K.S.A. 60-259 (b);

(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

(6) any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subsection (b) does not affect the finality of a judgment or suspend its operation. This section does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in K.S.A. 60-309 or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in this article or by an independent action.

STATEMENT OF THE CASE

A. Factual Background

The facts in this case, including the fraud committed by N.T. on M.P., the adoption agency, and the district court itself, are undisputed.

M.P. and N.T., the birth mother, conceived A.A.T. in late September or early October, 2003, in Jamaica, New York. The couple dated approximately seven months. (R. VIII. 21-22.) M.P. was the only man N.T. was intimate with during the period of conception and subsequent DNA testing proved what had never

really been contested: M.P. is the biological father of A.A.T. (R. IV. 303.)

M.P. did not abandon N.T. during her pregnancy. (R. V. 444.) N.T. traveled by plane from New York to Kansas on November 24, 2003, telling M.P. she would return. (R. VIII. 23-24.) M.P. continued the relationship throughout the pregnancy, offering love and emotional support by answering, initiating, and returning telephone calls from N.T. at all hours of the day and night. He provided money to N.T. when she requested it. M.P. made it clear to N.T. that he did not believe in abortion and that he would raise the child, but he also understood the choice was hers. M.P. told N.T. he would not consent to the child being adopted. (R. V. 442-43.) On or about January 22, 2004, N.T. informed M.P. she had terminated the pregnancy. (R. V. 442; R. VIII. 27-28.) This was not true.

N.T.'s actions to deceive and defraud began in November, 2003, when she traveled by plane to Kansas for Thanksgiving with her family. Unbeknownst to M.P., the ticket that N.T.'s mother purchased was a one-way airline ticket. N.T. promised M.P. in numerous telephone calls that she would return to New York. (R. VIII. 24, 26.) After Christmas, N.T. remained in Kansas. She told M.P. that she would return to New York after New Year's Eve 2004. Despite her promises, she never returned to New York. N.T. refused to give M.P. an address for where she was living in Kansas. (R. V. 442.)

On January 22, 2004, N.T. told M.P. that she had terminated the pregnancy. In February, 2004, N.T. asked M.P. for two hundred dollars. M.P. sent the money via Western Union to the address of N.T.'s sister at N.T.'s request, although N.T. was living with her mother in Kansas. (R. VIII. 28-30.)

Despite N.T.'s claims and unbeknownst to M.P., his son, A.A.T., was born in Wichita, Kansas, on June 24, 2004. Without M.P.'s knowledge or consent, N.T., relinquished the child to an adoption agency and an adoptive couple. (R. VIII. 34.) A.A.T. left the hospital in the temporary custody of his adoptive parents. N.T. talked to M.P. by phone the day after the child was born from her hospital room, but she said nothing about the baby. (*See* R. VIII. 24; *see also*, R. VIII. 102-103.)

N.T. deceived and defrauded more than just M.P. N.T. lied to her family, telling them that A.A.T. died during childbirth. (R. VIII. 31-32.) In order to accomplish the adoption, N.T. lied to the adoption agency, the district court, and the attorney appointed to represent the interests of the father. Her deceptions inaccurately portrayed M.P. as "M. Johnson." N.T. claimed M.P. did not support her during the pregnancy and told the adoption agency, the district court, and the father's attorney that "M. Johnson" lived somewhere in Harlem, New York, though N.T. knew M.P.'s exact whereabouts in Jamaica, New York. (R. I. 62.) N.T.'s sworn affidavit stated she had no way to contact M.P.. In truth, N.T. and M.P. were in constant contact, having talked to each other by phone more

than two hundred times between November 2003 and December, 2004.

Based on N.T.'s false statements, the court ordered publication notice of the adoption proceedings to the natural father. Notice to the incorrectly named father was made in the *New York Post* on July 30, 2004 and August 6, 2004 under the names of "M. Johnson" and "To Whom It May Concern." (R. I. 66.) The Court accepted as true N.T.'s statements that the father had abandoned her during the pregnancy, that she did not know the father's residence or have any way of contacting him, and that the father would consent to the adoption. On August 24, 2004, the district court terminated M.P.'s parental rights based on his failure to appear. The court entered the Decree of Adoption on behalf of the adoptive parents.

On December 24, 2004, N.T. finally told M.P. the truth: she had not terminated the pregnancy. Their son was born in June, 2004. (R. III. 34.) M.P. immediately sought counsel in Wichita, Kansas, traveled to Kansas to secure legal representation, and filed a Verified Petition to Set Aside the Adoption with the Sedgwick County District Court on February 2, 2005. (R. VIII. 109-10; *see also* R. I. 87-90.)

B. Proceedings Below

1. The District Court Ruling

After a one-day trial on March 26, 2007, the district court denied M.P.'s motion to set aside the adoption decree. The court reasoned that, despite the mother's fraudulent representation to M.P., the adoption agency, and the district court, M.P. should have taken more action to determine whether N.T. had terminated the pregnancy, or still carried and gave birth to his child. The district court did not specify or speculate on what actions M.P. should have taken.

M.P. appealed to the Kansas Supreme Court, arguing that the failure of the court to provide him with actual notice when his identity and whereabouts were known to the mother unconstitutionally deprived him of his due process opportunity to be heard and to withhold his consent to the adoption under the Fourteenth Amendment of the Federal Constitution. M.P. also argued that the adoption should be void based upon Kan. Stat. Ann. § 60-260(b)(4), that the adoption should have been set aside because of fraud based on Kan. Stat. Ann. § 60-260(b)(3), and that the adoption should be set aside because of the discovery of new evidence based on Kan. Stat. Ann. § 60-260(b)(2).

2. The Kansas Supreme Court's Majority Opinion

The Kansas Supreme Court affirmed the district court on December 12, 2008. The Kansas Supreme Court cited *Lehr v. Robertson*, 463 U.S. 248 (1983), and interpreted it as suggesting that, on the issue of the relevance of a mother's fraud when this fraud prevented actual notice to a biological father in a newborn adoption, both that the question had been left unanswered and that the Court had "clearly" chosen to "not consider the mother's efforts to thwart the father as even deserving of mention." Opin. at 1196. The Kansas Supreme Court then chose to apply the latter concept in this case. On this reading of *Lehr* and other high state court cases, the Kansas Supreme Court concluded that M.P.'s opportunity to develop a parenting relationship ended at the time of the adoption of his child, even if he did not grasp the opportunity for parental rights because of the mother's fraud:

> [A]s long as the state's statutes provide a process whereby most responsible putative fathers can qualify for notice in an adoption proceeding, the interests of the State in the finality of adoption decrees, as discussed in *Lehr* – providing a child stability and security early in life, encouraging adoptions, protecting the adoption process from unnecessary controversy and complication, and protecting other parties' privacy and liberty interests – justify a rule that a putative father's opportunity to develop a parenting

> relationship ends with the finalization of a newborn child's adoption even if the reason the father did not grasp his opportunity was because of the mother's fraud. *See Lehr*, 463 U.S. at 264-65, 103 S. Ct. 2985.

Opin. at 1196.

The Kansas Supreme Court also rejected M.P.'s statute-based arguments. According to the majority opinion, the adoption decree was not void because:

> had [M.P.] acted on those suspicions [that N.T. had not terminated the pregnancy], it would have taken relatively little effort for M.P. to have discovered the continued pregnancy or the birth of the child. N.T. testified that, although she discouraged contact between M.P. and her mother, her mother would have confirmed the continued pregnancy had M.P. asked.

Opin. at 1189. The majority opinion viewed M.P.'s failure to contact N.T.'s mother based on the above statement by N.T. as "substantial competent evidence" upon which to affirm the district court.

The Kansas Supreme Court majority denied M.P.'s motion to set aside the adoption based upon newly discovered evidence on the same grounds:

> Even though it may have been uncomfortable and awkward for M.P. to have talked to N.T.'s mother, he could have done so in an effort to verify or dispel his suspicions.

> Consequently, the evidence could have been discovered with minimal diligence[.]

Opin. at 1205.

The Kansas Supreme Court majority also affirmed the district court's ruling on the issue of fraud, stating that, even though N.T.'s fraud benefitted the adoptive parents:

> [T]o the extent that M.P. has an adverse party, that role is filled by the adoptive parents, who filed the petition for termination of M.P.'s parental rights. . . . [The] district court found that the adoptive parents and the adoption agency acted in good faith, and M.P. does not argue otherwise. . . . N.T. did not qualify as an "adverse party" and that M.P. was not entitled to relief under [Kan. Stat. Ann. §] 60-260(b)(3).

Opin. at 1204.

3. The Kansas Supreme Court's Dissenting Opinions

Three of the seven Kansas Supreme Court justices hearing the case wrote dissenting opinions.

a. Justice Nuss' Dissent

Justice Nuss identified four "significant problems" with the analysis of the majority. First, Justice Nuss disagreed with the Kansas majority's interpretation of *Lehr* as suggesting that facts of a mother's

fraudulent interference with the father's attempts to establish a relationship should be irrelevant on the issue of whether the father has grasped the opportunity for his parental rights. Opin. at 1218. The *Lehr* majority noted that, Justice Nuss wrote, "[t]here is no suggestion in the record that [the mother] engaged in fraudulent practices that led [the father] not to protect his rights." *Lehr*, 463 U.S. at 265, n. 23. The record in the *Lehr* case lacked evidence the mother had engaged in fraudulent practices that led the father to not protect his rights, suggesting that a fraud allegation would have affected the case's outcome. Opin. at 1218. According to Justice Nuss, the absence of findings of fraud in *Lehr* and the undisputed findings of fraud in the instant case distinguish the two cases.

Rather than ignoring the mother's fraud, Justice Nuss saw it as permeating every aspect of the analysis. Justice Nuss' dissent focused on the effect of N.T.'s fraud on M.P.'s actions in the months immediately preceding and following the birth of A.A.T. Opin. at 1205 (Nuss, J., dissenting). He noted that the district court specifically found N.T. had committed fraud and that this finding was never challenged at the trial level or on appeal. *Id.* at 1207. It was "conclusively well-established," according to Justice Nuss, that the father reasonably and justifiably relied upon the mother's lies about her abortion, that the father failed to act because of his reliance upon the mother's lies, and that the father's reliance on the mother's lies caused him to be unable to establish more than a

biological link with his son. Opin. at 1207. For Justice Nuss, the majority opinion's failure to consider, or at least give appropriate weight to, the mother's "vital interference" with the father's opportunity to assert his parental rights is "another significant problem with the majority opinion." Opin. at 1210.

Second, Justice Nuss suggested the legal analysis of this case should begin with an understanding of how N.T.'s unqualified right to terminate her pregnancy combined with M.P.'s respect for this right to make her fraudulent plan effective. N.T. possessed an exclusive right to decide whether to terminate the pregnancy that she could exercise above any of M.P.'s objections. *See Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 71 (1976). M.P. had no options when N.T. informed him she had terminated the pregnancy because this decision was hers alone. Justice Nuss noted:

> The year of mother's abortion lies, when coupled with her absolute constitutional right to unilaterally abort, easily distinguishes the instant case from those upon which the majority relies. In short, this is not a case where a father simply happened to be unaware of a pregnancy, birth, or adoption of his child. Nor is it a case where the mother simply attempted to prevent a father from developing a relationship with his known child. Rather, it is a case in which the mother has expressly informed the father that the pregnancy and, consequently, the potential child with whom he could develop a constitutionally protected

> parental relationship have both been legally and irreversibly terminated.

Opin. at 1206.

Third, Justice Nuss, joined by Justice Beier's separate dissent, addressed the majority's suggested means by which M.P. might have discovered the truth or otherwise preserved his parental rights. Both found that each suggestion ignored the comprehensive nature of N.T.'s deceptions, both found his diligent efforts to query her regarding his suspicions adequate to preserve his rights, and both questioned possible harmful effects of requiring fathers to overcome the kinds of fraudulent representations made in this case. For example, the majority suggested that M.P. could have come to Kansas to investigate and overcome the mother's deceptions, but Justice Nuss noted that M.P. believed N.T.'s promises to return to New York, making such a trip to "check on her" unnecessary. Justice Beier further objected:

> I do not accept that the United States Constitution or the adoption law of Kansas require him to hire a private investigator, as was suggested at oral argument, or to incur the expense to come to Kansas personally to challenge N.T.'s story.

Opin. at 1220.

To the majority's suggestion that M.P. could have called the Kansas house phone number to overcome the mother's lies, Justices Nuss and Beier again referenced the mother's deceptions. Justice Nuss

noted the majority ignored the fact that N.T. gave the phone number of the house where only N.T. answered the phone and that she testified to denying M.P.'s requests to talk with the grandmother or stepfather. Opin. at 1216.

> One must consider whether legitimate efforts of the father, designed to ascertain the unwed pregnant woman's veracity, are nevertheless construed by her as serious assaults on her integrity. When a mother becomes aware of a father's efforts to ascertain her veracity – whether calling the grandmother or the sister, as the majority suggests, or hiring a detective or coming to Kansas himself – those efforts can backfire. They can tip what already may be a precarious balance into the mother's unappealable decision to now obtain an abortion because she considers the father's efforts to be interfering with her unilateral right to abort. A mother might also realistically view the father's actions as stalking and a danger to her physically.

Opin. at 1217 (Nuss, J., dissenting). In her dissent, Justice Beier described N.T. as having "done everything in her power short of muzzling her mother to prevent M.P. from knowing the true state of affairs until A.A.T. was 6 months old." Opin. at 1220.

The majority also suggested that M.P. could have used the same New York putative father's registry as discussed in *Lehr*, although here the majority also recognized that "M.P.'s use of these procedures might not have guaranteed he would receive notice in

Kansas." Opin. at 1200-01. Justice Nuss noted that Kansas has neither a putative father's registry nor any provision for the filing of a paternity action before birth. Opin. at 1218-19. Justice Nuss also pointed out that:

> The mother's fraud here would have made that registration futile. Father would have undoubtedly registered under his true name. The mother's lies would have resulted in the Kansas court, similar to creating his faulty newspaper notice – sending a different name to the New York registry[.]

Opin. at 1218-19. For Justice Nuss, the majority's logic was puzzling:

> I remain puzzled about how a trial court can find it highly probable that [M.P.] reasonably relied upon abortion lies to his detriment but then find that [M.P.] should have discovered those lies with reasonable diligence or due diligence (Kan. Stat. Ann. § 60-260(b)(2)). A fortiori, I question how the majority opinion can then conclude that the lies could have been discovered with "minimal" diligence.

Id. at 1219 (internal citations omitted).

b. Justice Beier's Dissent

Justice Beier also viewed N.T.'s fraud on M.P., the court proceedings, and her family as directly relevant to whether M.P.'s opportunity interest deserved constitutional protection. She noted it was

"not a fact that he should have known N.T. was still pregnant." Opin. at 1220. M.P., according to Justice Beier, should not have been expected to be "clairvoyant" with respect to N.T.'s fraudulent representations that she had terminated the pregnancy. *Id.* She viewed M.P.'s diligence within the context of the pervasiveness of N.T.'s deceptions. Expecting M.P. to uncover N.T.'s lies at some earlier date, when she had already fooled everyone, established what Justice Beier termed a "nearly impossible standard." Opin. at 1225. Reasonable diligence should have been sufficient. According to Justice Beier, M.P. should not be required to "move heaven and earth." Opin. at 1227.

In addition, Justice Beier's dissent described the majority's mischaracterizations of Kansas law. Opin. at 1221. For example, Justice Beier disagreed with the majority's attempt to characterize Kan. Stat. Ann. § 59-2136(e) as providing "several mechanisms within a man's control which, if exercised entitle him to notice of adoption proceedings." *Id.* Justice Beier noted that this statute identifies the grounds and procedures for the court to employ to determine a father's identity, not mechanisms available to natural fathers whose identities mothers have concealed from the court. *See* Kan. Stat. Ann. § 59-2136(e). She concluded that "N.T.'s deceitful manipulation of Kan. Stat. Ann. § 59-2136(e) does nothing to demonstrate M.P.'s failure to diligently or promptly protect any parental rights[.]" Opin. at 1221.

Finally, Justice Beier's dissent noted the majority's refusal to apply numerous long-standing Kansas

precedents, specifically precedents calling for strict construction of statutes in adoption in the favor of biological parents. For example, Justice Beier also took issue with the district court ignoring the seven possible scenarios in Kan. Stat. Ann. § 59-2136(h)(1)-(7) under which M.P.'s parental rights could be terminated. Justice Beier noted previous cases in which the Kansas Court had held that:

> [T]he legislature had limited the circumstances in which an adoption could be granted without the consent of the father to the seven listed in the statute and were concerned only with whether substantial competent evidence existed to support the district judge's findings and decision under that provision. *In re Adoption of Baby Boy B.*, 254 Kan. 454, 866 P.2d 1029 (1994).

Opin. at 1221.

In viewing M.P.'s inchoate interest to have ripened into one deserving of constitutional protection, Justice Beier concluded that Kan. Stat. Ann. § 59-2136(h)(1)-(7) defined the due process to which M.P. was entitled. If none of the seven scenarios existed on August 24, 2004, Justice Beier recommended that the adoption decree be declared void and "M.P. would be entitled to the sole care, custody, control and management of A.A.T." Opin. at 1226.

c. Justice Rosen's Dissent

While concurring with Justice Beier's dissent and rationale, Justice Rosen expressed "disagreement with and concern over the apparent lack of consideration of the best interests of the child, A.A.T." Opin. at 1228. Justice Rosen viewed the due process rights of M.P. and the statutory rights of the adoptive parents as "dehumanizing," treating A.A.T. "as if he were a piece of chattel property with no rights and interests of his own." *Id.*

Justice Rosen argued that the best interests of the child should be the focus of the case, even when such consideration was not explicitly set forth in the statute in effect at the time of the adoption proceeding. Opin. at 1230. He reported that the Kansas Legislature amended Kan. Stat. Ann. § 59-2136(h) in 2007 to allow the court to "consider and weigh the best interest of the child" in addition to hearing evidence regarding the seven factors. *Id*. at 1229. Justice Rosen also explicitly rejected the parental preference doctrine, noting that "I do not believe that [A.A.T.'s] best interests are necessarily synonymous with those of either the adoptive parents or the natural father[.]" *Id*. at 1230.

REASONS FOR GRANTING THE PETITION

An unwed mother cannot defeat a father's constitutionally protected liberty interest by being a good liar. Thirty-eight percent of the children born in the

United States each year have unwed parents. This case affords the Court a simple opportunity, without changing or modifying a single federal or state law, to clarify due process guarantees for single fathers attempting to grasp their opportunity interest and commit to parenting. An unwed father's opportunity interest refers to his potential for establishing in a state court his fundamental liberty interests as a parent under the Fourteenth Amendment of the United States Constitution. By clarifying the Court's precedent in *Lehr v. Robertson* as standing for strict construction and application of statutory schemes regarding notice and consent to adoption, establishment of paternity, and termination of parental rights – not for allowing or ignoring fraudulent interference and obstruction – the Court can send a clear and powerful message: Play fair. Make it right. Simple notions of justice, simply applied.

I. The United States Supreme Court in *Lehr v. Robertson* did not intend to hold that a biological mother's fraud is irrelevant in an adoption proceeding, as is suggested by the Kansas Supreme Court, when the mother's fraud on the father and the court serves as the basis for the court's termination of parental rights and the denial of his opportunity to assert his constitutionally protected parental rights.

The Kansas Supreme Court acknowledged that "the outcome in these [newborn adoption] cases are

not perfectly consistent, given variability in fact situations and state laws." Opin. at 1194. This case and others like it reflect difficulties and disparities determining just exactly what the *Lehr* court intended when it established that unwed fathers must be guaranteed the chance to grasp the opportunity of parenthood. The Kansas Supreme Court acknowledged there are cases in which courts have ruled in the father's favor, usually noting circumstances causing the interests to balance differently. Opin. at 1199. Additionally, on the issue of whether a mother's fraud was relevant, the Kansas Supreme Court majority stated that the question is unanswered while also saying that the *Lehr* majority "clearly" ignored the possibility of the mother's fraud. Opin. at 1196. This case provides the United States Supreme Court with the opportunity to clarify the issue of the relevance of a mother's fraud.

An unwed father's opportunity interest refers to his potential for establishing in a state court his fundamental liberty interests in his parental rights. An unwed father's opportunity interest in a particular case, however, is not defined in any functional sense by the federal constitution or even federal cases. Instead state statutory schemes outline the criteria for either the establishment of paternity (i.e. a father grasping his opportunity), the requirement of a biological father's consent in an adoption (i.e. a father waiving his opportunity), or the termination of parental rights in newborn adoptions (i.e.

termination of a father's rights for failing to grasp his opportunity).

The Supremacy Clause of the Federal Constitution and recourse to this Court are only appropriate when state courts fail in this regard. "In some cases, however, this Court has held that the Federal Constitution supersedes state law and provides even greater protection for certain formal family relationships." *Lehr v. Robertson*, 463 U.S. 248, 257 (1983). This is such a case.

The Supreme Court has held that the Fourteenth Amendment "guarantees more than fair process" and "includes a substantive component that 'provides heightened protection against government interference with certain fundamental rights and liberty interests.'" *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (internal citation omitted). It is well established that the right to parent is a fundamental right protected by the United States Constitution. *See, e.g., Troxel*, 530 U.S. at 65-66; *Stanley v. Illinois*, 405 U.S. 645 (1972).

1. Lehr Majority Opinion

In *Lehr*, Justice Stevens outlined this Court's family law doctrine, which reflects judicious responses "to resolve the legal problems arising from the parent-child relationship." *Id*. at 256, 299. Justice Stevens noted that this Court established parental control over their children's education as part of "liberty," *see Pierce v. Society of Sisters*, 268 U.S. 510

(1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923), and that this "interest in liberty [was] entitled to constitutional protection." *See also Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (plurality opinion).

Justice Stevens also delineated two aspects of this Court's view of parent-State relations:

> [T]his Court [has] declared it a cardinal principle "that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." [*Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).] . . . "[S]tate intervention to terminate [such a] relationship . . . must be accomplished by procedures meeting the requisites of the Due Process Clause." *Santosky v. Kramer*, 455 U.S. 745 (1982).

Lehr, 463 U.S. at 257-58.

Next, Justice Stevens reviewed the Court's federal constitutional construction between 1972 and 1982 of what has become known as the "biology-plus" doctrine. In 1972, the Court held that the state of Illinois violated the Due Process rights of an unwed father when application of a state statute resulted in "automatic destruction of the custodial relationship without giving the father any opportunity to present evidence regarding his fitness as a parent." *Stanley v. Illinois*, 405 U.S. 645 (1972). In 1978, the Court affirmed Georgia state court decisions allowing an adoption when the child's unwed biological father had failed to legitimize the parent-child relationship.

Quilloin v. Walcott, 434 U.S. 246 (1978). In 1979, the Court affirmed the decisions of district and appellate courts in the state of New York establishing that legal fatherhood requires more than simply a biological connection; fatherhood requires a "full commitment" to parenthood.

> When an unwed father demonstrates a full commitment to the responsibilities of parenthood by "com[ing] forward to participate in the rearing of his child," *Caban* [*v. Mohammad*, 441 U.S. 380, 392 (1979)], his interest in personal contact with his child acquires substantial protection under the due process clause. At that point it may be said that he "act[s] as a father toward his children." *Id*. at 389, n. 7, 99 S. Ct. at 1766, n. 7.

Lehr, 463 U.S. at 261.

The *Lehr* court established the last component of the "biology-plus" doctrine:

> The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a

> state to listen to his opinion of where the child's best interests lie.

Lehr, 463 U.S. at 262.

In sum, while the *Lehr* majority outlined the history of the "biology-plus" doctrine and affirmed its use, the holding of the case was comparably narrow:

> The question presented is whether New York has sufficiently protected an unmarried father's inchoate relationship with a child whom he has never supported and rarely seen in the two years since her birth. The appellant, Jonathan Lehr, claims that the Due Process and Equal Protection Clauses of the Fourteenth Amendment, as interpreted in *Stanley* . . . and *Caban* . . . , give him an absolute right to notice and an opportunity to be heard before the child may be adopted. We disagree. *Lehr*, 463 U.S. at 249-50, 103 S. Ct. at 2987.

2. Lehr Dissenting Opinion

In a frequently discussed dissent joined by Justices Blackmun and Marshall, Justice White called for a "completed and factual record" before passing on the quality or substance of a relationship, not because facts regarding fraud were in the record, but because they were not. *Lehr*, 463 U.S. at 271. He noted Jonathan Lehr had never been afforded an opportunity to present his case and that Lehr's "version of the 'facts' paints a far different picture than that portrayed by the majority." *Lehr*, 463 U.S. at 270-71. He argued

that "but for the actions of the child's mother there would have been the kind of significant relationship that the majority concedes is entitled to the full panoply of procedural due process protections." *Id.*

Judge White also suggested that a biological father's due process protections required notice and an opportunity to be heard *before* the adoption. Justice White wrote that "the fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Lehr*, 463 U.S. at 268 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)). "If the entry of the adoption order in this case deprived Lehr of a constitutionally protected interest, he is entitled to notice and an opportunity to be heard before the order can be accorded finality." *Id*. The most meaningful time to be heard on the issue of consent and termination of parental rights is before the adoption. *Id.*

For Justice White, federal constitutional protections must be extended to all, not most, fathers. The state's procedures for the adequacy of notice "must be conducted on the assumption that the interest involved here is as strong as that of *any* putative father." *Lehr*, 463 U.S. at 272-73. These state procedures also "must at least represent a reasonable effort to determine the identity of the putative father and to give adequate notice." *Id*.

II. The Kansas Supreme Court misinterprets *Lehr* to hold that a mother's fraud is irrelevant or, if the father suspects he is being defrauded, he must overcome the fraud before the state will view his interests as worthy of constitutional protection.

The Kansas Supreme Court opinion reads *Lehr* and other high state courts as viewing state statutes constitutional despite a mother's fraud. For example, they stated:

> In general, the cases conclude that as long as the state's statutes provide a process whereby **most responsible putative fathers** can qualify for notice in an adoption proceeding, the interests of the State in the finality of adoption decrees, as discussed in *Lehr* . . . **justify a rule that a putative father's opportunity to develop a parenting relationship ends with the finalization of a newborn child's adoption even if the reason the father did not grasp his opportunity was because of the mother's fraud**.

Opin. at 1196 (emphasis added).

Lehr actually said:

> The [New York] commission recommended, and the legislature enacted, a statutory adoption scheme that automatically provides notice to seven categories of putative fathers who are likely to have assumed some responsibility

> for the care of their natural children. **If this scheme were likely to omit many responsible fathers, and if qualification for notice were beyond control of an interested putative father, it might be thought procedurally inadequate.**

Lehr, 463 U.S. at 263-64 (emphasis added).

Fraud was not a fact in *Lehr*. All responsible fathers, not just "most responsible fathers," are entitled to the constitutional protections of *Lehr*. The *Lehr* majority noted that the lower New York courts had rejected the father's argument that the mother was guilty of a fraud upon the court. *Lehr*, 463 U.S. at 254. They also stated, "[t]here is no suggestion in the record that the appellee engaged in fraudulent practices that led appellant not to protect his rights." *Lehr*, 463 U.S. at 265, fn. 23.

Can one really fathom that the United States Supreme Court would view a mother's fraud as irrelevant to whether a father had an opportunity to assert his liberty interests in parenting? Reading the *Lehr* majority's opinion as a belief in the facts favoring the mother rather than as viewing a mother's fraud to be irrelevant is a much more reasonable conclusion. *Lehr* did not outline the substantive content of the opportunity interest beyond strict compliance with a state statutory scheme. It established a minimum threshold that states could require fathers to meet before qualifying for constitutional protections for their parental rights. Jonathan Lehr's opportunity interests and the opportunity interests of

subsequent responsible fathers have depended upon whether a father has complied with the state statutes. Jonathan Lehr had not. He lost. Subsequent analyses of a father's opportunity interest should follow this precedent.

M.P. is a responsible father. N.T. told M.P. she intended to return to New York in order to continue the relationship. M.P. was in continuous phone contact with N.T., exchanging over two hundred phone calls during the course of the pregnancy. They were talking about a future together, including buying an apartment, N.T. going back to school, and finding a job in New York. Even after N.T. told M.P. she had terminated the pregnancy, she asked him for two hundred dollars and he sent the money. Both agree M.P. would have provided anything N.T. asked. Even though the Kansas District Court did not find that M.P. abandoned N.T., the Kansas Supreme Court ignored the uncontroverted fact that the relationship was ongoing.

Fraud and the Kansas courts' treatment of fraud as irrelevant are **the** issues in *In re A.A.T.* The mother's fraud on the father, the adoption agency, the Kansas Courts, and even her own family is undisputed. It is uncontroverted that N.T. told M.P. she had terminated the pregnancy after he refused to consent to an adoption. N.T. also concealed M.P.'s name and whereabouts when these were known to her, which resulted in publication of notice in the *New York Post* under a false name. This deprived M.P. of actual notice and his opportunity to be heard by the

court at the most meaningful time: before the adoption.

III. The Kansas adoption statutes are unconstitutional when applied in a manner that provides an unwed biological father no legal remedy after the court terminates his parental rights based on fraudulent behavior by a biological mother and he presents the court with undisputed evidence of the mother's fraud and his paternity in a timely fashion.

The Kansas statutory scheme as applied in this case provides no legal remedy to a biological father when a mother has fraudulently used the courts to deprive him of his opportunity to assert his parental rights. In Kansas, putative fathers have two protections against a mother's fraud: (1) the requirement that the statutory scheme be strictly construed in favor of natural parents, and (2) the legal remedies provided in Kan. Stat. Ann. § 60-260(b).

A. Strict Construction of Kansas statutes in favor of maintaining the rights of natural parents

Like the strict construction requirement in *Lehr*, Kansas adoption statutes are strictly construed in favor of maintaining the rights of natural parents. *In re Adoption of Harrington*, 228 Kan. 636, 620 P.2d 315 (1980). The circumstances in which a father's

parental rights can be terminated and an adoption granted without the consent of a father are limited to the seven items listed in Kan. Stat. Ann. § 59-2136(h). *In re Adoption of Baby Boy B.*, 254 Kan. 454, 866 P.2d 1029 (1994). Because Kansas does not have a putative father's registry and provides no other mechanism for a father to file a paternity action prior to the birth of his child, there is no guaranteed method for a father to protect his rights prior to the birth of the child. Therefore, it is essential that statutory remedies be available to him after the birth of the child.

B. Potential statutory remedies available to a father

A father's constitutionally protected opportunity interest is not guaranteed when the state statutory scheme can be easily defeated by a mother's fraud, especially when the state provides no realistic remedy. In Kansas, once an adoption is final, the probate court has jurisdiction over its adoption orders for thirty days pursuant to Kan. Stat. Ann. § 59-2212. After thirty days, the probate court's orders can only be vacated or modified as provided by Kan. Stat. Ann. § 60-260(b) of the Kansas Code of Civil Procedure. An order can be vacated when fraud is committed by an adverse party under Kan. Stat. Ann. § 60-260(b)(3). These protections are rendered illusory when a biological mother, who is not considered an adverse party in the adoption proceeding, commits fraud and the court is allowed to terminate the father's parental

rights, thereby allowing the mother's fraud to effectively serve as the means for dispensing with the father.

Where the specific remedy for fraud is unavailable, Kan. Stat. Ann. § 60-260(b)(2) provides a right for rehearing to consider newly discovered evidence. In their dissents, Justices Nuss and Beier viewed the father's actions as reasonably diligent under the circumstances and would have granted relief under § 60-260(b)(2). Opin. at 1219, 1227 (Beier and Nuss, JJ., dissenting).

> My evaluation of the adequacy of M.P.'s diligence is heavily influenced by the egregious nature of N.T.'s behavior. She lied repeatedly and obviously intentionally; she enlisted numerous unwitting accomplices to put and maintain both physical distance and information inequality between herself and M.P. – including the guardian ad litem, the adoption agency, and, for a few months, the court system. N.T. kept M.P. in the dark long enough that the adoption could be finalized without M.P.'s knowledge or involvement and, perhaps worst of all, until the notion of separating A.A.T. from his or her adoptive parents would be painful to contemplate. Although it is possible M.P. could have done more to expose N.T.'s lies before December 24 or 25, 2004, the standard for [Kan. Stat. Ann. §] 60-260(b)(2) due diligence is not that he move heaven and earth. Reasonably assertive behavior is sufficient. He had suspicions; and he persisted in voicing them to the one

> person in near total control of his access to the facts that would confirm or alleviate those suspicions. Eventually, N.T. cracked.

Opin. at 1227-28 (Beier, J., dissenting). Even when a timely motion to consider newly discovered evidence presented "extremely high" undisputed evidence of the mother's fraud on everyone, including the court, as well as testimony and irrefutable DNA evidence of the father's paternity, the majority denied M.P. relief under Kan. Stat. Ann. § 60-260(b)(2). *Id.* at 1227. Justice Beier termed the burden imposed by the majority a "nearly impossible standard." Indeed, can one truly imagine a putative father like M.P. having better evidence?

CONCLUSION

The Kansas Supreme Court, citing *Lehr*, has effectively placed the State's imprimatur on an expansion of the mother's privacy interests to totally exclude the father when she wishes for her child to be adopted. In effect, given this staggering precedent, neither the father's consent nor notice is truly necessary if the mother chooses to defraud him, then place their child up for adoption. This should not stand. For the above reasons, the writ of certiorari should be granted.

Respectfully submitted,

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