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Applicant as Amicus Curiae

IN THE SUPREME COURT OF THE STATE OF UTAH

State of Utah, in the interest
of J.M.S.

STATE OF UTAH,

Appellant,

vs.

J.M.S.,

Appellee.

Case No. 20091015-SC

**REQUEST FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE IN
SUPPORT OF APPELLEE J.M.S.**

Pursuant to Utah Rule of Appellate Procedure 25, the American Civil Liberties Union of Utah Foundation, Inc. (“ACLU of Utah”) respectfully requests leave of the Court to file an amicus curiae brief in this proceeding. The proposed brief will be filed in support of Appellee, J.M.S., a person under 18 years of age. Counsel for both parties have been served with a copy of this motion. Mr. King consented to the filing. An e-mail message was sent to Mr. Ballard but we have not received a response. If leave is granted, the ACLU of Utah will submit its brief as

amicus curiae within five (5) business days of notification that leave has been granted, or sooner if so directed by the Court.

The ACLU of Utah is knowledgeable of and interested in these proceedings, as set forth below:

The ACLU of Utah

The ACLU of Utah is a non-profit, non-partisan membership organization founded in 1958. *See* Affidavit of Darcy M. Goddard dated February 22, 2011 (“Goddard Aff.”) at ¶ 3. The ACLU of Utah is the state affiliate of the American Civil Liberties Union (“ACLU”), which was founded in 1920 to protect and advance civil liberties throughout the United States. *Id.* The ACLU has more than 500,000 members nationwide. *Id.* The ACLU of Utah has more than 2,200 members and supporters. *Id.*

Both the ACLU of Utah and the ACLU are dedicated to defending the guarantees of liberty and equality found in the federal and state Constitutions. *Id.* The ACLU of Utah has reviewed the briefing submitted in this matter by counsel for both parties, and believes it can provide important context, both legal and factual, for the arguments raised by the parties, which will substantially assist the Court in reaching a fair and just resolution in this case.¹ *Id.* at ¶ 6.

¹ Counsel for Appellee requested late last week that the ACLU of Utah consider submitting a brief of amicus curiae in this matter. Goddard Aff. at ¶ 4. We promptly obtained a copy of the record on appeal and the brief submitted by Appellant, the State of Utah, to the Utah Court of Appeals, on which the State also will rely before this Court. *Id.* at ¶ 4 & Ex. A thereto. On Friday, February 18, 2011, Appellee’s counsel confirmed that he, too, would rely on his brief to the Utah Court of Appeals rather than submit a new brief here. Goddard Aff. at ¶ 5. Having now reviewed the full briefing before the Court and the record on appeal, the ACLU of Utah believes it can provide additional information that will assist the Court in resolving this matter quickly, fairly, and justly. *Id.* at ¶ 6. We thus respectfully request that the Court determine sufficient cause has been shown to waive the requirement that this motion be filed “at least twenty-one days prior to the date on which the brief of the party whose position as to affirmance or reversal the amicus curiae . . . will support is due,” Utah R. App. P. 25, and that the Court grant this motion to submit a brief as amicus curiae.

The ACLU of Utah Can Provide Legal and Factual Historical Analyses to Assist the Court in Determining the Meaning of “Abortion” Under Utah Law

The ACLU of Utah and the ACLU have long histories of vigorously defending the right to privacy, including reproductive rights, through litigation and advocacy. Goddard Aff. at ¶ 7. Indeed, for more than thirty years, the ACLU has been involved with virtually every reproductive rights case to reach the Supreme Court of the United States. *Id.*

The ACLU of Utah was co-counsel in the case of *Jane L. v. Bangerter*, 61 F.3d 1505 (10th Cir. 1995), which followed on the landmark holding of the United States District Court for the District of Utah in *Jane L. v. Bangerter*, 794 F. Supp. 1537 (D. Utah 1992), that under Utah State law “a woman who seeks or obtains an abortion does not risk criminal prosecution.” *Id.* at 1547-48 (citing Utah Code Ann. 76-7-314 (Supp. 1991)); *see also* Goddard Aff. at ¶ 8. The juvenile court relied heavily on *Bangerter* and similar cases from other jurisdictions in determining that Appellee could not be held criminally liable for seeking to terminate her pregnancy, and that the criminal charges against her must be dismissed. (*See* Ruling on Motion to Dismiss at 3-4, *Utah v. J.M.S.*, No. 1018731 (Utah 8th Dist. Juv. Ct. Nov. 13, 2009), attached to Appellant’s Brief as Addendum C.)

The ACLU of Utah has also been involved in, and has advocated or testified at, every stage in the development of Utah’s statutes concerning reproductive freedom since at least 2003. Goddard Aff. at ¶ 9 & Ex. B thereto. In particular regard to the 2010 amendments to Utah’s abortion statutes, on which both parties rely (*see, e.g.*, Appellant’s Br. at 7-8 & nn. 1-2; Appellee’s Br. at 9-12), the ACLU of Utah was actively engaged in lobbying against and educating the public about HB 462 (and the related HB 12). Goddard Aff. at ¶ 10. The amendments contained in HB 462 were proposed in direct response to the facts of this case. *Id.* ACLU of Utah Legislative and Policy Counsel Marina Baginsky Lowe extensively researched

the relevant law in Utah and elsewhere, testified in multiple committee hearings, gave news media interviews, and lobbied individual legislators, warning them of the consequences of passing that legislation. *Id.*

The ACLU of Utah's familiarity and expertise with regard to Utah's abortion statutes and related case law, and especially in regard to the 2010 revisions that followed the acts at issue here, could greatly assist the Court in evaluating the parties' arguments and reaching a just resolution in this case.

The ACLU of Utah's Interest and Expertise in Indigent Defense Would Assist the Court in Determining Whether J.M.S. Did Not Receive Effective Assistance of Counsel and Whether the Lower Court Correctly Permitted J.M.S. to Withdraw Her "No Contest" Plea

Appellee also asserts on appeal that she was denied the effective assistance of counsel by her public defender, and that, on that and other bases, she was correctly allowed by the juvenile court to withdraw her plea of "no contest."² (*See* Appellee's Br. at 15-21.) The ACLU of Utah is uniquely well positioned to assist the Court in connection with those issues, as well.

The ACLU has for years sought to protect the rights of indigent criminal defendants, including assisting in the successful appeal to the United States Supreme Court in *Gideon v. Wainwright*, 372 U.S. 335 (1963). *Goddard Aff.* at ¶ 12. Moreover, for the last several years, the ACLU of Utah has been investigating the quality of indigent criminal defense in the State of

² Appellant's brief does not address these issues (*see, e.g.*, Appellant's Br. at 1 (listing only one issue, i.e., the statutory definition of "abortion," as the issue presented)), but Appellee discusses them at length (*see, e.g.*, Appellee's Br. at 2 (listing both issues as issues presented), 15-21). Although the juvenile court dismissed the criminal charges against Appellee on different grounds (*see* Ruling on Motion to Dismiss at 5, *Utah v. J.M.S.*, No. 1018731 (Utah 8th Dist. Juv. Ct. Nov. 13, 2009), attached to Appellant's Brief as Addendum C)), and although this Court need not reach these issues if it finds that the definition of "abortion" in Utah's abortion statutes encompasses the facts of Appellee's case, counsel's alleged ineffectiveness could present an alternative basis to rule in Appellee's favor, *see, e.g., Bailey v. Bayles*, 2002 UT 58, ¶ 13, 52 P.3d 1158, 1162 (2002).

Utah. *Id.* at ¶ 13. These efforts have coincided with national efforts to examine the continuing problems and constitutional inadequacies relating to indigent criminal defense throughout the United States (*id.*), including a draft report issued in January 2008 by the National Legal Aid and Defender Association (“NLADA”), which ranked the State of Utah last amongst all states in compliance (or lack thereof) with the constitutional obligations set forth in the Supreme Court’s decision in *Gideon*.³ *Id.* at ¶ 13; *see also* NLADA, *Gideon’s Unfulfilled Promise: The Right to Counsel in America*, at 7, 9 (January 31, 2008) (draft report), excerpts attached to Goddard Affidavit as Exhibit C thereto.

The criminal prosecution of Appellee commenced in Uintah County. Goddard Aff. at ¶ 16. Uintah County, like all Utah counties, receives no state funding for indigent defense and has no public defender office. *Id.* In 2009, Uintah County spent approximately \$4.16 per capita on indigent defense, which is far below the national average (\$11.86) and even below the Utah average (\$5.22). *Id.*

Because there is no public defender office, public defenders in Uintah County, as in most Utah counties, must grapple with county attorneys and commissioners to negotiate individual

³ In reaching that conclusion, the NLADA examined, among other things, the extent to which each state’s system for providing indigent criminal defense complies (or not) with the American Bar Association’s “10 Principles of a Public Defense System,” (*see* Goddard Aff. at ¶ 13 & Ex. C at 7 (sidebar on left)), and whether the state provides any funding for the provision of indigent defense (*id.* at ¶ 13 & Ex. C at 9). Utah as measured on a statewide basis does not comply fully with any of the “10 Principles” and is one of only two states (Pennsylvania is the other) that receive no state funding for indigent defense. *See id.* Utah is thus ranked in NLADA’s lowest category: “Gideon Ignored.” *See id.* at ¶ 14 & Ex. C at 6. Additionally, Utah ranks 48 out of 50 states in per capita spending for indigent defendants, spending just \$5.22 per Utahn as compared to the national average of \$11.86. *See* NLADA, *A Race to the Bottom: Speed and Savings Over Due Process: A Constitutional Crisis*, at 7 (June 2008) [hereinafter, “*Race to the Bottom*”], excerpts attached to Goddard Affidavit as Exhibit E thereto.

contracts, which often do not include appropriate compensation or support services, and which provide no oversight of attorney qualifications, workload, or work product.⁴ *Id.* at ¶ 17.

As in many Utah counties, the Uintah County Commission hires public defenders on the direct recommendation of the Uintah County Attorney. *Id.* at ¶ 18. Uintah County awards public defender contracts on the basis of the lowest bid submitted. *Id.* Uintah County does not maintain records to indicate what the contract caseload is for public defenders generally, or for specific public defenders. *Id.* Of particular relevance here, Uintah County has no written policies or procedures for identifying conflicts of interest in indigent defense cases, and instead relies only on presiding judges to disqualify attorneys for conflicts of interest that, presumably, would first have to be raised by the attorney himself or the clients whom he represents. *Id.* at ¶ 19.

Given the ACLU of Utah’s long-standing efforts to research and evaluate the provision of indigent criminal defense services throughout the State of Utah, including in Uintah County, we can provide the Court with additional context both for Appellee’s claim of ineffective assistance of counsel and as to whether the juvenile court correctly allowed her to withdraw her plea of “no contest.” *Id.* at ¶ 20.

⁴ The irregular, and almost entirely unregulated, county-by-county indigent defense “system” that results from the lack of state oversight and the disparate funding, training, and access to resources experienced by public defenders is constitutionally inadequate and ripe for judicial challenge. Various ACLU affiliates have brought such cases nationwide. *See, e.g., Duncan v. Michigan*, Case No. 07-242-CZ (filed Feb. 2007) (Michigan); *Best v. Grant County*, Case No. 04-2-00189-0 (filed Dec. 2004) (Washington); *White v. Martz*, Case No. C-DV-2002-133 (filed April 2002) (Montana). *See Goddard Aff.* at ¶ 21.

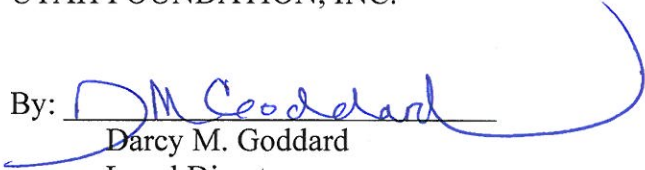
CONCLUSION

The ACLU of Utah has a strong and on-going interest in protecting the right to privacy, including in the area of reproductive rights, and in seeking to improve the State of Utah's indigent criminal defense system. For these reasons, among others, the ACLU of Utah respectfully requests leave to file a brief as amicus curiae in this proceeding in support of Appellee. If leave is granted, the ACLU of Utah will serve and file its amicus brief within five (5) business days of being notified of the Court's decision, or sooner if so directed by the Court.

DATED this 22 day of February, 2011.

Respectfully submitted,

THE AMERICAN CIVIL LIBERTIES UNION OF
UTAH FOUNDATION, INC.

By: 
Darcy M. Goddard
Legal Director

Attorney for Amicus Curiae

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed by first-class mail, with a courtesy copy sent by electronic means, a true and correct copy of this REQUEST FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLEE J.M.S. and the AFFIDAVIT OF DARCY M. GODDARD IN SUPPORT OF THE ACLU OF UTAH'S MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLEE J.M.S., to:

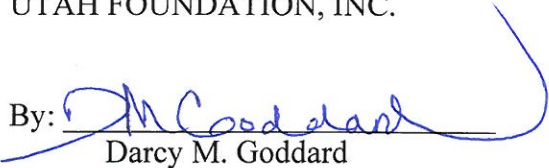
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on this ___ day of February, 2011, postage pre-paid.

THE AMERICAN CIVIL LIBERTIES UNION OF
UTAH FOUNDATION, INC.

By: 
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