Karen Caffrey HB 5144

To Senator Terry Gerratana and Representative Susan Johnson, Co-Chairs, and Members of the Public Health Committee:

On behalf of Access Connecticut, I would like to respectfully request your support of House Bill 5144, An Act Concerning Access to Birth Certificates and Parental Health Information for Adopted Persons.

Prior to this public hearing, several legislators have asked Access Connecticut whether any case law exists which would prohibit the legislature from restoring adult adoptee access to original birth certificates, particularly if it is done so retroactively**.**

Courts have long recognized that the decision about whether adoptees have a right to access their original birth certificates is a matter of social policy that is within the discretion of the legislature. The history of access laws reflects that the legislature has always had the freedom to set policy that reflects the best understanding of the time regarding what is best for the parties involved.

Courts that have addressed challenges to open access laws have held that birth parents do not have a right to anonymity from their offspring. Challenges have been raised on a number of state and federal constitutional grounds. The consensus has been that the issue is a matter of social policy left to the discretion of state legislatures.

A detail legal analysis of the relevant court decisions, and their applicability to the law as it exists in Connecticut, is set forth below.

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To: Karen Caffrey, President, Access Connecticut

From: Kevin Munn, Student, University of Connecticut School of Law

Date: February 26, 2014

Re: Retroactive application of adoptee birth certificate access laws

Introduction

The General Assembly is free to grant adoptees the right to access their original birth certificates. Connecticut law has never provided birth parents with an expectation of anonymity from their biological children. Courts have long recognized that the decision about whether adoptees have a right to access their original birth certificates is a matter of social policy that is within the discretion of the legislature. The history of access laws reflects that the legislature has always had the freedom to set policy that reflects the best understanding of the time regarding what is best for the parties involved. For a short period of time in our history, there may have been a genuine belief that the relevant interests were best served by preventing adoptees from accessing information regarding their birth parents. However, that is no longer the case. Research shows that all parties involved are best served by recognizing the right of adoptees to access their original birth certificate. The legislature is free, just as it always has been, to change the law to reflect this current understanding.

Courts that have addressed challenges to open access laws have held that birth parents do not have a right to anonymity from their offspring. Challenges have been raised on a number of state and federal constitutional grounds, and can generally be divided into two broad categories: first, claims that birth parents have a constitutionally-protected interest in preventing disclosure of private or confidential information concerning adoption records; and second, claims that applying open access laws retroactively violates an expectation of anonymity created by preexisting state laws. All of these challenges have been rejected. The Sixth Circuit Court of Appeals and the Tennessee Supreme Court rejected claims that Tennessee's open access law violated the United States Constitution and the Tennessee Constitution, respectively. The Oregon Court of Appeals rejected claims that an Oregon ballot initiative violated both the state and federal constitutions. The consensus has been that the issue is a matter of social policy left to the discretion of state legislatures.

I. Birth Parents Do Not Have A Constitutional Right To Prevent Disclosure Of Adoption Records.

Courts have long held that the decision regarding whether to allow adoptees access to adoption records is left to the discretion of the legislature. Consistent with this principle, courts rejected claims that open access laws violate birth parents' right to privacy on both state and federal constitutional grounds. Claims that open access laws violate birth parents' right to privacy have taken three forms. First, birth parents have claimed that open access laws violate birth parents' right to "familial privacy" by impeding their right to decide whether to raise a family. Second, birth parents have claimed that open access laws violate their right to "reproductive privacy" by impeding their decision whether to carry a child to term. Third, birth

parents have claimed that their right to avoid disclosure of confidential information is violated by laws allowing adoptees access to their adoption records. Each and every one of these claims has been unsuccessful. Courts have recognized that open access laws do not violate birth parents' right to privacy.

Open access records do not violate birth parents' right to familial or reproductive privacy because such laws do not impede the right to raise children as one sees fit, or the right to decide whether to have children in the first place. The right to give a child up for adoption is not a fundamental right, but rather is a right created by statute. Because the right of adoption is a creation of state legislatures, laws concerning adoption will necessarily reflect the legislature's judgment about what is in the best interests of society. Thus, as the Tennessee Supreme Court recognized, state legislatures are free to conclude that open access laws are "in the best interest of both adopted persons and the public." *Doe v. Sundquist*, 2 S.W.3d 919, 926 (Tenn. 1999). This sentiment was also reflected in the Oregon Court of Appeals decision rejecting the claim by birth mothers that the decision to give a child up for adoption is equivalent to the decision to have an abortion:

> A decision to prevent pregnancy, or to terminate pregnancy in an early stage, is a decision that may be made unilaterally by individuals seeking to prevent conception or by a woman who wishes to terminate a pregnancy. A decision to relinquish a child for adoption, however, is not a decision that may be made unilaterally by a birth mother or by any other party. It requires, at a minimum, a willing birth mother, a willing adoptive parent, and the active oversight and approval of the state. Given that reality, it cannot be said that a birth mother has a fundamental right to give birth to a child and then have someone else assume legal responsibility for that child. . . . Although adoption is an option that generally is available to women faced with the dilemma of an unwanted pregnancy, we conclude that it is not a fundamental right. Because a birth mother has no fundamental right to have her child adopted, she also can have no correlative fundamental right to have her child adopted under circumstances that guarantee that her identity will not be revealed to the child.

Does 1–7 v. State, 993 P.2d 822, 836 (Or.App. 1999), *review denied*, 6 P.3d 1098 (Or. 2000).

Further, as the Sixth Circuit recognized, parents may still freely choose to give a child up for adoption in states that have open access laws. *Doe v. Sundquist*, 106 F.3d 702, 705–07 (6th Cir. 1997). Open access laws do not prevent parents from choosing to give a child up for adoption; they merely alter the rules that define when and under what circumstances adoptees may access their original birth certificates.

Similarly, open access laws do not implicate any right of birth parents to prevent disclosure of confidential information. Even assuming there is such a constitutional right,[1] the disclosure to an adoptee of her original birth certificate does not implicate that right. First, a birth certificate contains information about both the parents and the child, and thus does not contain information that is "private" to the birth parents vis-à-vis the adoptee. Second, information concerning a birth is not generally considered "confidential"; the government routinely collects and preserves birth records. *See Does 1–7 v. State*, 993 P.2d at 836 (1999) ("Neither a birth nor an adoption may be carried out in the absolute cloak of secrecy that may surround a contraception or the early termination of a pregnancy. A birth is an event that requires the generation of an accurate vital record that preserves certain data, including the name of the birth mother."). As the Second Circuit has recognized, "there is no question that an individual cannot expect to have a constitutionally protected privacy interest in matters of public record." *Doe v. City of New York*, 15 F.3d 264, 268 (2d Cir. 1994). This is why the Sixth Circuit expressed considerable doubt that the Constitution prevents disclosure of information concerning a birth: "A birth is simultaneously an intimate occasion and a public event—the government has long kept records of when, where,

and by whom babies are born. Such records have myriad purposes, such as furthering the interest of children in knowing the circumstances of their birth." *Doe v. Sundquist,* 106 F.3d at 705.

These cases are consistent with how courts have historically treated the constitutionality of state laws regulating access to adoption records. During the time when almost all states provided for sealed adoption records, some adoptees sought access to their records on the ground that they had a constitutional right to the information. Courts rejected these claims, holding that it is within the province of state legislatures to set the policy they deem appropriate based on their determination of what is best for society. *See, e.g., Alma Soc., Inc. v. Mellon,* 459 F.Supp. 912, 917 (S.D.N.Y. 1978), *aff'd*, 601 F.2d 1225 (2d Cir. 1979); *Mills v. Atlantic City Dept. of Vital Statistics*, 372 A.2d 646, 652 (N.J. Super. 1977).

II. Preexisting Laws Providing For Sealed Adoption Records Do Not Vest Birth Parents With An Expectation of Anonymity From Their Children

State laws providing for sealed adoption records do not vest birth parents with an expectation of anonymity. Laws providing that adoption records are to be sealed do not provide an absolute bar to the release of the information to adoptees, but merely limit the circumstances under which adoptees may gain access to the records. In other words, the law has never guaranteed birth parents that adoption records would not be made available to adoptees. Because the law has never vested birth parents with an expectation of anonymity from their biological children, the legislature is free to change the terms under which adoptees may gain access to their records.

A. *Oregon and Tennessee State Court Decisions*

The Oregon Court of Appeals and the Tennessee Supreme Court addressed claims that preexisting laws in those states providing for sealed adoption records created an expectation that the records would remain sealed, and that applying open access laws retroactively unconstitutionally violated that expectation. Both courts held that state laws providing for sealed adoption records did not vest birth parents with an expectation of anonymity or confidentiality.

In *Doe v. Sundquist*, the Tennessee Supreme Court held that retroactive application of the state's open access statute was not a violation of the state constitutional prohibition of retrospective legislation. *See* Tenn. Const. Art. I., § 20. After reviewing the history of the state's adoption laws, the court held that birth parents did not have an expectation that adoption records would always remain sealed, or that their identities would remain confidential, because the law always provided a mechanism for adoptees to gain access to the information:

> There simply has never been an absolute guarantee or even a reasonable expectation by the birth parent or any other party that adoption records were permanently sealed. In fact, reviewing the history of adoption statutes in this state reveals just the opposite. Accordingly, we disagree with the … conclusion that the plaintiffs had a vested right in the confidentiality of records concerning their cases with no possibility of disclosure.

Doe v. Sundquist, 2 S.W.3d 919, 925 (Tenn. 1999).

In *Does 1–7 v. State*, the Oregon Court of Appeals held that the retroactive application of the state's ballot initiative did not impair the plaintiffs' adoption contracts in violation of the state constitution. *See* Or. Const. Art. I, § 21.[2] The court held that state law prior to passage of the ballot initiative did not provide an assurance of confidentiality as part of birth parents' adoption contracts. The court reviewed the history of Oregon's adoption laws, and concluded that the

statutes never expressed the legislative intent to enter into a statutory contract that would prevent disclosure of birth parents' identities:

> [T]he laws governing confidentiality of adoption records have been amended regularly throughout this century to provide varying degrees of confidentiality at various times. At no time in Oregon's history have the adoption laws prevented all dissemination of information concerning the identities of birth mothers…. Moreover, the laws do not demonstrate a legislative intent to elevate considerations of a birth mother's desire for confidentiality over the legitimate needs of other interested parties in obtaining information concerning the birth.

Does 1–7, 993 P.2d 822, 832 (Or.App. 1999). *See also id.* at 833. The court also rejected the plaintiffs' claim that promises made by adoption agencies created an expectation of confidentiality, concluding that agents may not bind the state to an agreement that contravenes state law. *Id.* at 833.

B. *Connecticut Adoption Laws Do Not Vest Birth Parents With An Expectation of Anonymity From Their Biological Children*

Connecticut law does not vest birth parents with an expectation of anonymity from their biological children. As with the sealed records laws that were replaced with open access laws in Tennessee and Oregon, Connecticut adoption laws have never provided a guarantee that adoption records will always remain sealed. Prior to 1975, Connecticut adoptees had the right to obtain their original birth certificates upon request. *See* Gen. Stat. § 7-53 rev. 1975. In 1975, the General Assembly passed a law providing that the original birth certificate of an adopted person could be inspected only upon a determination by the Probate Court that disclosure would not be detrimental to the public interest, or to the welfare of the adoptee, the birth parents, or the adopted parents. *See* Public Acts 1975, No. 75-170. In 1977, the General Assembly amended the

law again, providing that, in most cases, consent of the birth parent(s) is required before the Probate Court may order disclosure of an adoptee's birth records. *See* Public Acts 1977, No. 77-246; *see also Sherry H. v. Probate Court*, 177 Conn. 93, 98–99 (1979). However, the law has never provided birth parents an absolute guarantee of anonymity. While consent is generally required before the Probate Court may order disclosure of an adoptee's original birth certificate, Gen. Stat. §§ 7-53, 45a-751b, & 45a-752, there are exceptions. In addition, adoptees have always been able to learn of the identity of their birth parents through private investigation. Finally, current law cannot guarantee birth parents anonymity from their biological children: the termination of parental rights proceeding takes place before the adoption proceeding, and adoptees' original birth certificates are not sealed until the adoption is finalized

First, consent of the birth parents is not required in cases where the birth parents cannot be located, or where the birth parents are incompetent or incapable of consent. *See* Gen. Stat. § 45a-753(c)–(f). In such cases, a guardian ad litem makes the determination of whether to give consent on behalf of the birth parents. The adoption agency then creates a report to determine whether release of the information either would be disruptive to, or would endanger, the adoptee or the birth parents. Significantly, the discretion of the guardian ad litem and the Probate Court is limited, and the statute seems to favor disclosure. The guardian ad litem "**shall give such consent** unless after investigation he concludes that it would not be in the best interest of the adult person to be identified for such consent to be given." Gen. Stat. § 45a-753(e) (emphasis added). Likewise, the statute provides that the information "**shall be provided**" unless the Probate Court determines that the guardian ad litem did not consent, or that release of the information would be "seriously disruptive to or endanger" either the adoptee or the birth parents. Gen. Stat. § 45a-753(f)(8) (emphasis added). Thus, the law currently does not bar

adoptees from accessing their birth certificates absent consent of their birth parents in all circumstances.

Second, since 1987, the law has provided that adoptees may obtain identifying information regarding a birth parent upon request after the death of the birth parent. *See* Public Acts 1987, No. 87-555; Conn. Gen. Stat. 45a-753(e). This means that, even under current law, any expectation of anonymity necessarily only lasts for the life of the birth parents. Thus, there is no reasonable basis for birth parents to expect that their identities will forever remain a secret from their biological children.

Third, adoptees have always been able to discover the identity of their birth parents through private investigation. The ability of adoptees to discover the identity of their birth parents through private investigation has increased because of social networking websites. *See* Lisa Belkin, *I Found My Mom Through Facebook*, NY Times, June 26, 2011, at ST1. Some adoptees have even turned to companies that offer DNA testing services. *See* Rachel L. Swarns, *With DNA Testing, Suddenly They Are Family*, NY Times, January 24, 2012, at A1. In addition, under current law, parents who consent to the termination of their parental rights sign an affidavit indicating their awareness of the possibility that their child "may have the right to information which may identify me or other blood relatives." Affidavit/Consent to Termination of Parental Rights, JD-JM-60 Rev. 7-11. Currently, whether an adoptee is able to identify his or her biological parents is often arbitrary, and the initial contact is often random and unexpected, as biological parents do not have a mechanism to indicate whether they prefer to be contacted.

Finally, if parental rights are terminated and the child is never adopted, the original birth certificate is never sealed, in which case there is no restriction on the right of the child to access

his or her birth certificate. This is so because the termination of parental rights proceeding precedes, and is separate from, the adoption proceeding:

> Adoption decisions are not made until after the termination and are separate proceedings in Probate Court…. Although petitions for termination are presumably seldom brought unless prospective adoptive parents are available, there still must be a two-step process to determine, first, the threshold question of whether cause for termination … has been proved…. Only if a ground for termination exists may the suitability and circumstances of adoptive parents, in an appropriate proceeding, be considered.

In re Ryan V., 46 Conn.App. 69, 73–74 (1997) (citations omitted); *see also* Gen. Stat. § 45a-725 et seq. In addition, the child's original birth certificate is sealed when the **adoption** is finalized, not when the biological parents' rights are terminated. In other words, whether the child's birth certificate is sealed is determined by a proceeding independent of the biological parents' decision to give up their parental rights. Thus, current law cannot guarantee to parents anonymity from their biological children.

Conclusion

Whether adoptees should be afforded the right to access their original birth certificates is a matter of social policy that is within the discretion of the legislature. There is no constitutional or statutory basis to conclude that birth parents have a right to anonymity from their biological children. No constitutional right to privacy prevents state legislatures from providing adoptees access to there birth certificates, and Connecticut law has never vested birth parents with an expectation of anonymity from their biological children. The legislature has the authority to change current law and set the policy that reflects the current understanding of what is best for society.

[1] The United States Supreme Court has never expressly held that the disclosure of confidential information is protected by the Constitution. *See Nat'l Aeronautics & Space Admin. v. Nelson*, 131 S. Ct. 746, 756–57 (2011). Some lower federal courts, including the Second Circuit, have held that the constitutionality of laws requiring disclosure of some kinds of personal information is subject to a balancing test akin to intermediate scrutiny. *See Barry v. City of New York*, 712 F.2d 1554, 1559 (2d Cir. 1983). The Connecticut Supreme Court signaled its agreement with that approach in *State v. Russo*, 259 Conn. 436, 461 (2002).

[2] The plaintiffs also claimed that the law impaired their adoption contracts in violation of art. I, § 10 of the United States Constitution. The court rejected that claim on the same grounds on which it rejected the state claim. *See Does v. State*, 993 P.2d at 834.