Proponent Testimony on Senate Bill 23
Senate Committee on Medicaid, Health and Human Services
April 17, 2013

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Chairman Jones and the members of the Senate Medicaid, Health and Human Services Committee,

I am a professor at the University of Baltimore School of Law, where I teach courses in the areas of constitutional law and family law. Since the 1990s my research and writing have focused on adoption law, including the history and current status of the law governing adoption records. I attach a Washington Post op-ed summarizing some of this work, and I provide citations and links below to relevant articles, including my forthcoming article on the terms of the surrender agreements that birth mothers signed during the last century.

1. **Has the law guaranteed lifelong anonymity for birth parents?** As federal and state courts have found in cases challenging restored access, lifelong anonymity has not been guaranteed by the federal or state constitutions or by the state laws sealing court and birth records. And confidentiality has not been promised in the agreements birth mothers entered into when they surrendered their children for adoption. In Ohio, as in virtually every state, adoption records have been accessible by court order without notice to or participation by birth parents. As in Ohio, it has typically been up to the adoptive parents, not the birth parents, whether to change the child's name (and often even whether to have an amended birth certificate issued). In many adoptions, the adoptive parents have received copies of documents with identifying information about the birth mother.

As explained at length in other submitted testimony, when the first two states restored access for adult adoptees -- Tennessee and Oregon -- their laws were unsuccessfully challenged in the courts. The Oregon courts held that under state and federal constitutions, the law neither unconstitutionally impairs the obligation of contract nor invades a guaranteed privacy right. Oregon's adoption laws never "prevented all dissemination of information concerning the identities of birth mothers. At no time in Oregon's history have the adoption laws required the consent of, or even notice to, a birth mother on the opening of adoption records or sealed birth certificates." A birth mother does not have "a fundamental right to give birth to a child and then have someone else assume legal responsibility for that child .... Adoption necessarily involves a child that already has been born, and a birth is, and historically has been, essentially a public event."

Opponents of the Tennessee law argued unsuccessfully in federal court that the law violates constitutional rights of birth mothers to familial privacy, reproductive privacy, and the non-disclosure of private information. In subsequent state court litigation, the Tennessee Supreme Court upheld the statute, deciding under the state constitution that the law neither impaired birth mothers' vested rights nor violated their right to privacy. The court noted that early state law did not require sealing records, and that later law permitted disclosure upon "a judicial finding that disclosure was in the best interest of the adopted person and the public," with no requirement that birth parents be notified or have an opportunity to veto

contact. The court found that "[t]here simply has never been an absolute guarantee or even a reasonable expectation by the birth parent" that records would never be opened.[1]

Later laws restoring access – in Alabama, Delaware, Illinois, Maine, New Hampshire, Rhode Island -- have not been challenged.

2. What choices were given and what promises were made to birth mothers by adoption agencies and other adoption facilitators? Opponents of adult adoptee access to original birth certificates have never produced a copy of a document that promises a birth mother even confidentiality on the part of the agency. This fact inspired me to investigate what the surrender agreements did provide. I have collected documents from birth mothers who were given copies of the documents they signed; many birth mothers were not. I have analyzed 77 documents signed by birth mothers from the late 1930s to 1990, the date the last state denied access to adult adoptees. From decade to decade and from state to state, the provisions of these documents are the same.

The birth mother surrenders all of her parental rights and is relieved of all of her parental obligations. She does not retain or acquire any rights. While an adoption of the child is an aim or the aim of the surrender, there is no promise that the child will be adopted. Many documents spell out the possible alternatives of foster care or institutionalization. The birth mother has no right to notice of any future proceeding and therefore will never know if the child is successfully adopted. If the child is not adopted, there will be no amended birth certificate.

None of the documents promise the birth mother confidentiality or lifelong anonymity, the latter of which an agency of course could not guarantee. Responsible adoption services providers have known at least since the 1970s that adoption experts were increasingly supporting adult adoptee access to information and that legislative efforts were underway to restore access in those states in which it had been foreclosed.

Forty percent of the documents do, however, contain promises about future access to information or future contact. *It is the birth mother who promises that she will not seek information about the child or interfere with the adoptive family.* All six of the Ohio documents[2] in the collection fall into this category. For example, a 1979 surrender to Catholic Social Services of the Miami Valley states, “It is further agreed that the undersigned [the birth mother] will abide by the rules and regulations of the certified institution or organization, board or department, not to communicate with said child, or induce him/her to leave the institution or family with whom he/she might be placed, and to sever all connections with said child . . . .”

3. Did birth mothers -- although they were not and could not be offered a choice of whether to remain forever unknown to their children -- desire confidentiality or anonymity? As a commission appointed by the governor of my state found in 1980, the birthmother “had no choice about future contact with her relinquished child;” “[s]ecrecy was not offered her, it was *required* . . . as a

[1] Language in this and the previous paragraph is taken from pages 432-434 of my 2001 article, which is cited at the end of this testimony.

[2] Lorain County Child Welfare Board, 1967; Catholic Family & Children’s Services, Diocese of Cleveland, 1968; Catholic Service League, Inc., Diocese of Youngstown, Ashtabula, 1972; Catholic Family & Children’s Services, Diocese of Cleveland, 1973; Catholic Family & Children’s Services, Diocese of Cleveland, 1975; Catholic Social Services of the Miami Valley, Dayton, 1979.

condition of the adoption." The evidence is that birth mothers who sought confidentiality were seeking to conceal their pregnancies from their parents, or from other members of their communities, rather than to conceal their identities forever from their children or to foreclose for themselves any chance of learning how their children fared in life.

This historical account is consistent with today's realities. Openness is now the norm in domestic infant adoptions, and the common understanding is that birth parents are more open placing their children for adoption *if* there will be a degree of openness in the adoption arrangement. With respect of birth parents' current attitudes about adult adoptees' access to original birth certificates, studies and surveys conducted since the 1980s show that overwhelmingly large majorities of birth parents, up to 95 percent and above, either do not oppose, or approve of, or actively support access and are open to contact with their children. Many birth parents as well as adult adoptees spend years, and considerable sums of money, searching for information about one another. While many are successful in their searches, as countless stories in the media attest, many adult adoptees who search for information about their original identities remain unsuccessful and frustrated because they lack access to their original birth certificates.

4. Why were records closed? When adoption records around the United States were closed to inspection by the parties to the adoption as well as the public, they were closed to protect adoptive families' privacy and to protect adoptive families from possible interference or harassment by birth parents, not to protect birth parents' privacy.

In the 1940s and 1950s, many states followed the recommendation of adoption and vital statistics experts to make adoption court records and original birth certificates generally available only by court order, but to keep original birth records available on demand to adult adoptees. This was the recommendation of the first Uniform Adoption Act, promulgated in 1953. Similarly, the position of the United States Children's Bureau was that adopted adults have a "right to know who he is and who his people were."

Despite the experts' recommendations, many states did begin to close original birth certificates to adult adoptees as well as others. By 1960, 26 states had done so, although in a few of those states, court records remained available for some time after that date to either adoptive parents or to adult adoptees. In the states in which access to both court and birth records had become available only by court order, the reason given for closing records to the parties was the need to protect adoptive families from birth parents, not to protect the privacy of birth parents.

Then, of the states that in 1960 still recognized adult adoptees' right to original birth certificates on demand, four states, including, as you know, Ohio, closed the original birth records in the 1960s, six states closed them in the 1970s, and seven more did so only after 1979. (Since 1990, when Alabama closed these records, Alabama, Delaware, Illinois, New Hampshire, Maine, Oregon, Rhode Island and Tennessee have restored access for all or for almost all adult adoptees.) In Alaska and Kansas, the records have never been closed and have always been available on demand.

5. Has retaining or restoring adult adoptee access to records proved beneficial? States' legal systems in which adult adoptees have access to their original birth certificates have operated successfully, including those systems in which records have always been open and those systems in which formerly closed records have been opened to adult adoptees. In all of those states, adult adoptees are not arbitrarily separated into two groups -- adoptees who are able to find information about their origins without access

to their birth certificates and adoptees who are not able to find information without that access. Birth parents have been afforded a means they formerly lacked to alert adult adoptees about their wishes; adult adoptees have obtained fundamental information about themselves; and in cases in which adoptees and birth parents have wished to meet and become acquainted, access has led to countless fulfilling reunions.

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Related references:

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How Adoption in America Grew Secret, Op-Ed, Wash. Post, Oct. 21, 2001, at B5. (Attached.)

The Washington Post, October 21, 2001, Sunday

How Adoption in America Grew Secret; Birth Records Weren't Closed for the Reasons You Might Think
Elizabeth J. Samuels

They've become a standard of news features, magazine articles and movie plots: the stories of men and women, adopted at birth, who decide to seek out their biological parents. The urge for reunion seems so elemental that a plethora of organizations has sprung up to assist adoptees in their search. Today, the Internet is replete with Web sites offering registries to help adoptees and their birth families find each other by matching up information such as dates and places of birth.

But many adoptees "in search" are not able to find information through these organizations or official state registry systems. Their only hope is access to original records, such as their unamended birth certificates. And this, unfortunately, is a source of information that remains largely closed to them, even though, as studies now show, most birth parents are open to being found.

In fact, most birth parents may never have objected. The general public assumption seems to be that, from the beginning, adoption records were closed in large part to protect the birth mother's identity. But that isn't the case at all -- as I discovered when I undertook to research a question arising from my own family's experience. The child my sister had surrendered for adoption was able to locate us in the late 1980s because my sister had given birth in England, where records have been open to adult adoptees since 1975.

As I saw what profound satisfaction mother and daughter experienced getting to know each other, I began to wonder why almost every U.S. state had decided to close records to the adult children of adoption in the first place. What I found surprised me.

Legal adoption in America only came into being starting in the second half of the 19th century, and at first all adoption records were open to the public. When they began to be closed, it was only to the general public, and the intent was to protect adoptees from public scrutiny of the circumstances of their birth. Later, as states began to close records to the parties themselves, they did so not to provide lifelong anonymity for birth mothers, but the other way around -- to protect adoptive families from possible interference or harassment by birth parents.

One of the most prominent actors in the development of adoption law in the mid-20th century was the Children's Bureau, an arm first of the U.S. Department of Labor and later of the Department of Health, Education and Welfare. In the 1940s and '50s, the bureau advised that birth and adoptive parents who did not know one another should not have access to information about each other. But it also said that original birth certificates should be available to adult adoptees. As one of the bureau's consultants put it in 1946, "every person has a right to know who he is and who his people were."

In the '40s and '50s, most state laws did permit adult adoptees to view their birth records. But by 1960, 26 states were making both original birth records and adoption court records available only by court order. Twenty other states still made the birth records available on demand, but over the following 30 years, all those states but three -- Alaska, Kansas and South Dakota -- closed records to adult adoptees.

Why were states closing their records even before 1960, when the reasons being advanced were all about protecting adoptive families, and not birth parents? The historical record suggests that birth mothers were in fact seeking a measure of confidentiality. What the mothers wanted, however, was not

to prevent the adoptive parents and the children they had surrendered from discovering their identities, but to prevent their families and communities from learning of their situations. A powerful reason for the earliest closings of birth records to adult adoptees may simply have been that it was consistent with an emerging social idea about adoption: that it was a perfect and complete substitute for creating a family by childbirth, so the adopted child had no other family and would never be interested in learning about any other family.

Once most states sealed records for everyone except adult adoptees -- and many states foreclosed access even to them -- the record-sealing laws themselves may have helped foster the notion that lifelong secrecy is an essential feature of adoption. Adult adoptees increasingly felt discouraged from seeking information about their birth families, and those who did were viewed as maladjusted. By the 1970s, legal comments and court opinions started to talk about the reason for permanently sealed records in terms of birth parents' rights to lifelong anonymity. And states continued to pass laws foreclosing adult adoptees' access to birth records.

Since the adoptees' rights movements began in the 1970s, it has encountered stiff opposition to its efforts to win legal access to birth records. Only in the past six years have adoptees won an unqualified right to view records in three states -- Tennessee, Oregon and Alabama [and since the article was published New Hampshire, Maine, and Illinois have provided access either to all or almost all adoptees]. Also, Delaware [has made] records available if birth parents have not filed an objection. Around the country, legislatures are considering similar laws, but these are exceedingly limited gains for a movement nearly 30 years old.

Recently, celebrating Family History Month, Sen. Orrin G. Hatch encouraged Americans to "find out more about where they came from" because "researching ancestry is a very important component of identity." As more state legislatures contemplate giving adult adoptees the right to research their ancestry, they should understand that once it was considered entirely natural and desirable to let adoptees learn who their people were.

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[After publication, I learned that in 1960 even fewer than 26 states had made all court and birth records available only by court order. At least 2 of the states that had sealed birth certificates still provided access to court records.]