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At the request of  
The POST ADOPTION CENTER  
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**ANALYSIS OF THE IMPACT OF A.B. 1349 ON THE RIGHT TO  
PRIVACY UNDER THE CALIFORNIA CONSTITUTION**

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Assembly Judiciary Committee  
California State Legislature  
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# ANALYSIS OF THE IMPACT OF A.B. 1349 ON THE RIGHT TO PRIVACY UNDER THE CALIFORNIA CONSTITUTION

## I. INTRODUCTION

AB 1349 seeks to accord to a class of adult citizens of California—adults who were adopted as children—a right that is given by law to and assumed as an entitlement of personhood and citizenship by every other Californian: the right to know one’s own origins and to access one’s original birth records. The Judiciary Analysis of AB 1349, prepared in anticipation of the most recent hearing on the bill in the Assembly Committee on the Judiciary (April 17, 2001), suggests that AB 1349 may be a violation of birth parents’ right privacy guaranteed by the California Constitution. Comm. Rep. CA A.B. 1349 (the “Analysis”) [Exhibit. A].<sup>1</sup> While this Analysis acknowledges the concerns of another class of citizens—parents who have elected to relinquish their natural children for adoption—it does not fully address important factual and legal issues critical to the fundamental interests of adult adoptees.

To begin, the current law mandating the amendment and sealing of birth records is not about protecting the privacy rights of birth parents, and it never was. Rather, closed adoption laws arose out of the now antiquated philosophy of shame surrounding illegitimacy and adoption.

More important, however, under controlling California case law, a birth parent’s constitutional right to privacy will not be violated by AB 1349 because: (1) birth parents have no fundamental right to permanently hide their identifies from their children; (2) the

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<sup>1</sup> Copies of non-legal authorities cited in this paper are compiled as exhibits for your convenience in the accompanying binder. A copy of the current version of AB 1349 is attached as Exhibit O. Copies of cited cases are arranged in alphabetical order as Exhibit P.

identifying information at issue can be and has already been made public by the state, and thus birth parents have no reasonable expectation of privacy in public information; and (3) revealing crucial information about a person's origins to that person cannot be said to violate current social norms.

Any one of these points compels the conclusion that AB 1349 would not violate the constitutional right to privacy. However, as we demonstrate below, even if a birth parent had a protectible privacy right in the fact of her child's birth and adoption, the right of adult adoptees to their own most fundamental personal information is a competing and compelling privacy interest which plainly tips the balance in favor of allowing the disclosure of the information.

## II. DISCUSSION

### A. A Brief History Of The Laws Mandating The Sealing of Birth Records

#### 1. The intent behind laws sealing birth records in the United States was not protection of birth parent privacy.

Adoption records and original birth certificates have not always been sealed. Birth certificates themselves only came to be required in the United States in the first decade of the twentieth century. In the mid-1920s, there were virtually no confidentiality or secrecy provisions in adoption law. Elizabeth J. Samuels, "The Idea of Adoption: An Inquiry into the History of Adult Adoptee Access to Birth Records," 53 Rutgers L. Rev. 367, 374 (Winter, 2001) [Ex. B].<sup>2</sup> When adoption records began to be closed in the 1930s, most laws precluded only the general public from access – not the participants

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<sup>2</sup> See also, Elizabeth J. Samuels, "How Adoption in America Grew Secret," The Washington Post, Sunday, October 21, 2001; Page B5 [Ex. C].

themselves. The intent of these laws was to protect the adopted child from the stigma of illegitimacy. Samuels, 53 Rutgers L. Rev. at 373-75.<sup>3</sup>

Initially, therefore, there was no intent or thought to bar adoptees from obtaining the original, unamended certificates that reflect the official public record of their own births. *Id.* at 377-78. However, from the 1930s forward, as the process of adoption itself began to grow more secretive, state legislatures began to pass laws sealing original birth certificates, and by the early 1980s, legislatures in most states had passed laws sealing adoption records not just from the public at large, but even from the adult adoptee herself. *Id.* at 381-385.

The reasons for this change had almost nothing to do with protecting the privacy of birth parents.

When one searches the historical record from the 1930s through the 1960s to understand how and why the adoption process became cloaked in secrecy—specifically why court records in most states came to be closed to all, and birth records in many states came to be closed even to adult adoptees . . . one finds that the reasons proffered for confidentiality and secrecy focus solely on protecting adoptees from embarrassing disclosure of the circumstances of their birth and on protecting adoptive parents and their adoptive children from being interfered with or harassed by birth parents, as it was believed they might be if birth parents and adoptive parents who were unknown to one another were to learn one another's

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<sup>3</sup> See also, Naomi Cahn, Jana Singer, “Adoption, Identity and the Constitution,” 2 U. Pa. Const. L. 150, 154-55 (Dec. 1999) [Ex. D]; Desmond Tuck, “The End of Adoption Secrecy is Nigh” 7 S.F.L. REV. 41 (1997) [Ex. E].

identity. Among the legal, social service, and other social science commentators, there appears to be no or virtually no discussion of a need to protect birth parents from adult adoptees seeking and acquiring information about their birth families.

*Id.* at 385.<sup>4</sup>

Elizabeth Samuels argues that the impetus for sealing records in the 1940s and 1950s was the emerging social idea that adoption was a perfect and complete substitute for creating a family by childbirth. The adopted child was intended to grow up without any other family, and without expressing any interest in any other family.” *Id.* at 404.<sup>5</sup> “The law could confer on children in need of families new identities that would obliterate forever their original identities, and the law could provide adoptive parents with children who, like children born to them, would have no connection with any other family. *Id.* Essentially, the child was seen as a blank slate ready for the adoptive parents to write upon, it being assumed that “well adjusted” adoptees would have no interest in their origins. *Id.* at 410-12. As any student of human nature will readily acknowledge, however, this assumption about a basic lack of curiosity and about the absence of a deep psychological need to know one’s origins is wrong.

Samuels concludes that “[t]he paucity of explicit reasons articulated through the 1960s for eliminating adult adoptee access to birth records suggests that when many court records were sealed and some original birth records were sealed even from adult adoptees, the closings of the birth records to adult adoptees reflected . . . [this] social

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<sup>4</sup> AB 1349 is about acquiring information. We note that both then, and particularly now, the law protects legitimate interests in freedom from abusive interference, harassment or meddling.

<sup>5</sup> See also, Cahn and Singer, 2 U. Pa. Const. L. at 154.

context, and not a legislative response to real or imagined problems associated with such access.” *Id.* at 403

**2. The California laws sealing adoption records were initiated to hide the shame surrounding adoptions, not to protect the privacy rights of birth parents.**

The California law providing for an amended birth certificate to be issued for an adopted child (currently Health and Safety Code sections 102635 and 102680) was first enacted in 1933. It provided that when a decree of adoption was entered:

[u]pon request a certificate of birth shall be issued bearing the name of the child as shown in the decree of adoption, the names of the foster parents of said child, the age of the foster parents, the sex, date of birth and place of birth, but no reference in any birth certificate shall have reference to the adoption of said child.

(Stats. 1917, p. 717, sec. 15a., effective 1933) [Exhibit F].<sup>6</sup>

This initial version of the statute also stated that this amended birth certificate “shall be the only birth certificate open to public inspection.” *Id.* However, the statute allowed any member of the adoption triad access to the “original record of birth.” Specifically, it provided that the original birth certificate “shall not be accessible to any one except upon request of the child or his foster or natural parents or upon order of the court of record.” *Id.*

In 1935, the statute was amended to provide that the original birth certificate, along with the certificate of the decree of adoption “shall be available only upon the order

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<sup>6</sup> The original statute, enacted in 1915, provided for the registration and preservation of records of births, marriages and deaths by the state. [Ex. F]

of a court of record.” Subsequent amendments in 1941 and 1963 applied the law to children born in California, but adopted elsewhere, and prohibited omission of the name and address of the hospital or facility where the birth occurred from the amended birth certificate unless requested by the adopting parent.<sup>7</sup> The California legislature also subsequently passed legislation allowing release of adoption records on a showing of good and compelling cause.<sup>8</sup>

The 1935 amendment contains no expression of legislative intent. Proposed bills restricting access to adoption records were described in contemporary newspaper articles, however, as intended to protect adoptive parents from blackmail by unscrupulous people who “threaten[ed] to tell the child it was adopted,” and to save adopted parents and adoptee from embarrassment—issue that are no longer a realistic concern today. *Sacramento Bee*, January 22, 1935, p. 6; January 14, 1935, p. 6 [Ex. G]. There is no evidence that the “privacy interest” now being cited as impetus for the legislature’s decision—that is, the birth parent’s supposed desire for anonymity—was actually in the mind of the legislature at the time it sealed adoption records.<sup>9</sup>

### **B. The Right To Privacy Guaranteed Under The California Constitution Will Not Be Violated By AB 1349**

The constitutional right to privacy is found in Article I, Section 1 of the California Constitution, which reads as follows:

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<sup>7</sup> An amendment in 1957 was a nonsubstantive reorganization of the law.

<sup>8</sup> Health & Safety Code § 102705 (added in 1995), formerly Health & Safety Code § 10439 (added in 1957), formerly Health & Safety Code § 10254 (added 1939).

<sup>9</sup> The right to privacy provision of the California Constitution was not enacted until almost forty years later.

All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.

Enacted November 5, 1974 [Ex. H].

This provision does not guarantee a blanket right to privacy.<sup>10</sup> In 1994, the California Supreme Court set out guidelines to follow in addressing alleged violations of California’s constitutional right to privacy in *Hill v. National Collegiate Athletic Ass’n*, 7 Cal. 4th 1 (1994). Under *Hill*, a right to privacy claim has three elements: (1) the identification of a specific, legally protected privacy interest; (2) a reasonable expectation of privacy under the circumstances; and (3) conduct by defendant [assuming an adversarial proceeding] which is sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right. *Id.* at 35-37. If all three elements are established, *Hill* additionally requires that the individual’s privacy interest be balanced against countervailing interests, because an “[i]nvasion of a privacy interest is not a violation of the state constitutional right to privacy if the invasion is justified by a competing interest.” *Id.* at 37-38. In summary then, there can be no violation of the state constitutional right to privacy if any

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<sup>10</sup> Indeed, this fundamental provision gives equal rights to every citizen to pursue happiness and to be allowed appropriate rights of privacy. It does not give the adult adoptee—who is the captive of decisions made often long ago by others—a lesser right to the pursuit of his own happiness or autonomy. Yet, current law does exactly that. Every other person or entity involved with the adoption—the birth parents, the adoptive parents and the State—has the right to know the facts of the adopted child’s birth, and can choose to make these most fundamental facts about another person public or keep them secret. Only the adoptee does not.

of the three elements just discussed is lacking or if one or more countervailing interests justify the denial of an otherwise protectible privacy interest. *Id.* at 40.

**1. Birth parents’ privacy interest in permanently hiding their identities from their children is not a compelling interest.**

“The first essential element of a state constitutional cause of action for invasion of privacy is the identification of a specific, legally protected privacy interest.” *Hill* at 35.

“Legally recognized privacy interests are generally of two classes: (1) interests in precluding the dissemination or misuse of sensitive and confidential information (“informational privacy”); and (2) interests in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference (“autonomy privacy”). *Id.*

The birth parent’s interest at issue here does not appear to fall cleanly into either class. Disclosing identifying information to an adult adoptee at least eighteen years after the birth of the adoptee is neither a widespread dissemination nor a misuse of sensitive and confidential information. Furthermore, while birth parents may have an interest in making personal decisions or conducting personal activities without interference from the general public, no one would have the temerity to argue that this prohibition extends to the provision of essential information to their own children, especially where such an “interest” can only be bought by denying another person his or her identity – an extremely high price.<sup>11</sup> But, even assuming that a birth parent does have a protectible

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<sup>11</sup> It has been suggested that the birth parents’ interests at issue here involve fundamental “rights of family privacy” that protect “the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing,” and thus is subject to the protections afforded reproductive choice by the federal Constitution. *See* Diana G. Lim to The Honorable Robert Presley, “Adoption Records: Open Access - #26071” (1990) (referenced in the Analysis) at pp. 2-3. [Ex. I] But, as the Oregon appellate court has since pointed out, the interest at stake here is not analogous to those involved reproductive choice:

*(Footnote continued)*

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[W]e are unable to conclude that a law that permits adult adoptees access to vital records concerning their birth has the same sort of constitutional infirmities as the laws that criminalized contraception and abortion that were struck down in *Griswold*, *Eisenstadt* and *Roe*. 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 contraception or by a woman who chooses 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 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 1-6 v. State of Oregon*, 164 Or.App. 543, 565 (1999).

Several years earlier, after reaching the same conclusion, the Sixth Circuit noted:

Even should it ultimately be held some day that the right to give up a baby for adoption or to adopt a child is protected by the Constitution, such a right would not be relevant to this case. Because the challenged law [opening adoption records to adult adoptees] does not limit adoptions, cases striking down laws restricting abortion are not analogous. And even assuming that a law placing an undue burden on adoptions might conceivably be held to infringe on privacy rights in the *Roe* realm, much as laws placing “undue burden[s]” on abortions are unconstitutional under *Planned Parenthood v. Casey* [complete citation omitted], [the proposed law] does not unduly burden the adoption process. Whether it burdens the process at all is the subject of great dispute . . . Any burden that does exist is incidental and not ‘undue.’

*Doe v. Sundquist*, 106 F.3d 702, 706 (6th Cir. 1997)

privacy interest in the information that she relinquished a child, for the reasons explained below, that interest cannot rise to the level of a constitutionally-protected right. See Sections B and C, below.

Indeed, Elizabeth Samuels' examination of social services and other social literature through the 1960's reveals that although there are indications that unmarried mothers who relinquished their children for adoption sought "a measure of confidentiality," the kind of protection they sought "was not protection from the discovery of their surrendered children as adults." Rather, "[t]hey sought arrangements that would conceal their pregnancies from their parents or from other members of their communities, or from both." *Id.* at 399-400.<sup>12</sup>

## **2. Birth parents of adult adoptees do not have a "reasonable expectation of privacy" in the information at issue.**

Moreover, even if birth parents have a privacy interest here, they do not have reasonable expectation of privacy. Under settled California law, a reasonable expectation of privacy with regard to particular information is a threshold element that must be met before a court need undertake any analysis of whether the information is subject to the constitutional right of privacy. *Hill* at 36. "Even when a legally cognizable privacy

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<sup>12</sup> The argument that there exists some quasi-contractual agreement between the state and birthmothers that involves the promise and corresponding duty of confidentiality on the part of the state was squarely rejected in *Does 1-6 v. State of Oregon*, 164 Or.App. 543, 993 P.2d 822, 827-33 (1999) (state legislative scheme governing sealing of adoption records not part of a contract between state and birth mothers and hence, open records law did not impair the obligations of contract). Adoption statutes are based on the legislature's determination as to what is in the best interest of the child, which is in turn based on prevailing sociological and psychological concepts. What may be "in the best interests of a child" may not be in the best interests of the adult that child becomes. Moreover, as is noted below, secrecy in adoption is no longer endorsed by the mental health community. See page 17, *infra*.

interest is present, other factors may affect a person's reasonable expectation of privacy.”  
*Id.*

Birth parents of adult adoptees do not have a reasonable expectation of privacy with regard to either the fact that they had a child or that they relinquished that child for adoption for the following reasons.

**a. California law limits the confidentiality of adoptees' birth records.**

The birth of a child cannot be an entirely private act because California law requires that every live birth be registered with a public entity. Health & Safety Code § 102400.<sup>13</sup> Additionally, under California law, all records and information pertaining to adoption, including the adopted child's original birth certificate, may, without the birth parents' permission, be released by court order upon a showing of good and compelling cause. Health & Safety Code § 102705.<sup>14</sup>

Furthermore, although current law provides for the creation of a new birth certificate upon adoption of a child, showing the adoptive parents as the birth parents, the law does not provide for destruction of the original birth certificate. Health & Safety Code §§ 102635, 102645, 102680, 102685.<sup>15</sup> Indeed, because an amended certificate is

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<sup>13</sup> Added in 1995, formerly Health & Safety Code § 10100 (added in 1957), formerly Health & Safety Code § 10175 (added in 1939). Copies of the relevant Health & Safety and Family Code sections are compiled for your convenience as Exhibit J.

<sup>14</sup> Added in 1995, formerly Health & Safety Code § 10439 (added in 1957), formerly Health & Safety Code § 10254 (added 1939).

<sup>15</sup> Section 102635 was added in 1995, formerly section 10432 (added in 1957), formerly section 10253.7 (added in 1941); Section 102645 was added in 1995, formerly sections 10433 (added in 1957), formerly sections 10252, 10253 (added in 1935); Section 102680 was added in 1995, formerly section 10434 (added in 1957), formerly section

*(Footnote continued)*

not issued until a report of adoption is received, (and therefore cannot supplant the original certificate under until the adoption has taken place) there is no confidentiality attached to the birth and relinquishment of a child until that child is adopted – which may not occur for years. *Id.*

In any event, adoptive parents have the power under the law to prevent the state from amending the original birth certificate. Health & Safety Code § 102640. *Id.* Indeed, under Family Code § 9200, the adoption petition, relinquishment of consent, agreement, order, report to the court from any investigating agency, and any power of attorney or deposition filed in the office of the county clerk are, without the permission of the birth parents, are open to inspection by the parties to the adoption proceeding (that is the birth parents and the adoptive parents), with no requirement of good cause shown, and open to inspection by others by court order.<sup>16</sup> Those documents contain identifying information about the birth parent(s), thus undermining any expectation of privacy birth parents could claim in that information.

In order to create an arguably protectible privacy right, the expectation of privacy must not only be subjectively, but also objectively reasonable. *Wilkinson v. Times Mirror Corp.*, 215 Cal.App.3d 1034, 1037 (1990). Where, as here, confidentiality of records is conditional and limited, there can be no objectively reasonable expectation of privacy in regard to those records. *Rosales v. City of Los Angeles*, 82 Cal.App.4th 419, 426, 428-29 (2000); *Michael v. Gates*, 38 Cal. 4th 737, 745 (1995).

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10253 (added in 1939); Section 102685 was added in 1995, formerly section 10435 (added in 1957), formerly section 10253.5 (added in 1941).

<sup>16</sup> Added in 1992, formerly Civil Code § 229.10 (added in 1990). Note that notice of future government action (here, intention to make records available to parties to the adoption) can negate a reasonable expectation of privacy regarding information that will be made available as a result of that action. *Hill*, 7 Cal. 4th at 36.

In considering this identical issue, the Tennessee Supreme Court held:

Early adoption statutes did not require either that the records be sealed or that the identity of the parties remain confidential. Later amendments to the statutes provided that, even if sealed, records could be disclosed upon a request by an adopted person and a judicial finding that disclosure was in the best interest of the adopted person and the public. Still other amendments enacted in 1982 and 1985 permitted disclosure under certain circumstances even without a judicial finding. 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 the state reveals just the opposite. Accordingly, we disagree with the Court of Appeals' conclusion that 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)<sup>17</sup>

**b. Civil discovery rules also provide for disclosure of personal information like that contained in birth records.**

Under the California civil discovery rules, the constitutional right of privacy does not provide absolute protection against disclosure of personal information. The right to privacy must be balanced against the rights of the civil litigant to discover relevant facts. *Hooser v. Superior Court*, 84 Cal.App.4th 997, 1004 (2000); see also, *Board of Trustees*

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<sup>17</sup> *Sundquist* is especially relevant because the Tennessee Constitution, like that of California, provides a right to privacy greater than that created by the federal constitution. *Sundquist*, 2 S.W.3d at 925, 926; *American Academy of Pediatrics v. Lungren*, 16 Cal.4th 307, 326 (1997).

*of Leland Stanford Jr. University v. Superior Court of Santa Clara County*, 119 Cal.App.3d 516, 525 (1981) (In reconciling the competing public interests of preserving confidential information on the one hand and allowing litigants access to relevant information on the other, courts allow access to private information if the information is directly relevant, there is a compelling need for the information, and the discovery request is narrowly tailored.); *Fults v. Superior Court In and For Sonoma County*, 88 Cal.App.3d 899, 902 (1979) (in paternity case where plaintiff alleged that defendant was the father of her child, defendant's narrowly drawn interrogatory regarding the plaintiff's sexual activity three months before and three months after conception of the child was appropriate).

The identity of birth parents would thus arguably be discoverable in an action in which the information was relevant, *e.g.*, adoptive parents seeking updated medical information on birth parents and/or birth relatives to assist in the diagnosis and treatment of disease or to fraud by an adoption agency. *Johnson v. Superior Court*, 84 Cal.App.4th 997, 1004 (2000). Again, this possibility means that birth parents cannot reasonably expect that their identities will remain confidential.

### **3. The recent public sale of the California Birth Registry means that birth parents' identities are in the public domain.**

Moreover, where information is, for whatever reason, already in the public domain, there is no objectively reasonable expectation of privacy with regard to that information. *Bradshaw v. City of Los Angeles*, 221 Cal.App.3d 908, 921 (1990). California has made its birth registry available for sale pursuant to the Public Records Act (the "Act"), Government Code §§ 6250 et seq. In the past year, several genealogy websites have purchased the registry and have posted the registry on the internet, thus bringing it into the public domain. *See* Jennifer Coleman, "Online Birth Records Raise Privacy Worries," Associated Press, published in the Contra Costa Times, November 30,

2001, <http://www.contract>. [Ex. K] The Registry lists all births in California, including adoptees, from 1905 to the present, by date and county of birth, and includes birth parents' names.

This public disclosure of identifying information nullifies any reasonable expectation of privacy birth parents may have had in the information. Indeed, the birth registry containing the identity of birth parents is now required, by the waiver provision of the California Public Disclosure Act, to be disclosed and made public for inspection by every citizen. Government Code § 6254.4.<sup>18</sup> As a result, there is no reasonable expectation of privacy in the information contained in those records. *Benjamin Stackler v. Department of Motor Vehicles*, 105 Cal.App.3d 240, 247 (1980) (“no reasonable expectation of privacy in that which is already public.”) Without a reasonable expectation of privacy, birth parents cannot claim that their constitutional right to privacy has been violated. *Hill*, 7 Cal. 4th 1 at 36-37; *FTB v. Superior Court*, 164 Cal. App. 3d

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<sup>18</sup> The California Public Records Act provides that state agencies shall make public records available except where such public records are expressly exempt from disclosure by provisions of law. Government Code § 6253. The Act provides, however, that notwithstanding any provision of law, whenever a state or local agency discloses a public record, which is otherwise exempt from disclosure under the California Public Records Act, such disclosure shall constitute a waiver of the specified exemption. Government Code § 6254.5. The practice of disclosing otherwise exempt records thus destroys the privilege of confidentiality otherwise permitted by the Public Records Act. *Black Panther Party v. Kehoe*, 42 Cal.App.3d 645, 656 (1974). Since records are either completely public or completely confidential, when a record loses its exempt status under the Public Records Act (by being disclosed) every citizen has a right to inspect it. 42 Cal.App.3d at 656.

The California birth registry never protected from disclosure, and, under the precepts of the Act, it certainly cannot be after its public dissemination. Here, although adoptees' birth certificates themselves (that is the protected records) have not been released to the public, the identifying information within them has been. Under principles of equity, it may be that the State has waived its right to assert that that material is protected.

526 (1985) (no violation of the constitutional right to privacy because no reasonable expectation of privacy in the names and incomes of policyholders in Safeco's deferred annuity plan when the information sought was required by law to be produced to the FTB and the IRS).

**C. AB 1349 Is Narrowly Tailored, And Does Not Constitute An “Egregious Breach Of Social Norms” Rising To The Level Of A Violation Of The Right To Privacy.**

Finally, even if birth parents had a protectible privacy right and a reasonable expectation of privacy, the *Hill* court made clear that not every intrusion into one's private information constitutes a violation of one's constitutional right to privacy. “Actionable invasions of privacy must be sufficiently serious in their nature, scope, and actual potential impact to constitute an egregious breach of social norms underlying the privacy right.” *Hill*, 7 Cal.4th at 5. AB 1349 cannot constitute an “egregious breach” because it would not allow public access to identifying information, but rather, would limit access to those persons directly involved in the adoption process. *See Hill*, 7 Cal.4th at 38 (intrusion which is limited and “carefully shielded from disclosure except to those who have a legitimate need to know” may “assuage privacy concerns.”) Moreover, adoptees seek only those documents that relate to them directly. Every other citizen of this state has access to his or her original birth certificate. Adoptees deserve access to this fundamental personal document as well.

As Adam Pertman explains in his recently published examination of adoption in America, *Adoption Nation*, society's concept of adoption has altered radically in the past two decades. The cloak of secrecy that once shrouded the adoption process is rapidly falling away. Pertman, *Adoption Nation*, Perseus Books Group (2000), at pp. 44-48 [Ex. L]; Samuels, 53 Rutgers L.Rev. at 435-36. More and more adoptees are searching for and finding their birth parents, and the truth of their origin. More and more birth parents

and adoptive parents are choosing some form of open adoption, as the benefits of openness become better understood. Pertman, *Adoption Nation*, at pp. 15-18 (“[S]ocial-work and mental-health experts have reached a consensus during the last decade that greater openness offers an array of benefits for adoptees . . .” at the same time as they have learned of the “emotional and psychic injuries” that secrecy and denial inflict on birth mothers.)<sup>19</sup>

Moreover, research demonstrates that, in contrast to the speculation that most birth parents seek to maintain secrecy around adoption, a significant majority of birth mothers are themselves interested in obtaining information about their relinquished children. One study of birth mother preference indicates that over 90% of birth mothers welcomed contact from their children. *See*, “Birth Parent Responses to Confidential Intermediary Searches on Behalf of Adoptees,” compiled by Fred F. Greenman, Sept. 9, 1999 [Ex. M]; *see also*, Pertman, *Adoption Nation*, at pp. 129-130.

It is simply not credible, in such a climate, to assert that allowing adult adoptees access to the most fundamental information about themselves is somehow “an egregious breach of social norms.” To the contrary, in the past ten years, open records laws have been passed in three states, and are being considered in others. No constitutional challenge to these recently passed laws has been successful. *See, Does 1-6 v. State of*

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<sup>19</sup> Pertman also demonstrates that there is no hard evidence behind the notion that increased openness in adoption will lead to a decrease in adoptions and an increase in abortions: “Most states with closed records report higher abortion rates and lower adoption rates than either Kansas or Alaska [the only two states in which adoptees’ documents have always been open]; furthermore, historically, the incidence of abortion in a given state has not dropped after it sealed birth certificates and other identifying information.” *Adoption Nation*, pp. 128-30.

*Oregon*, 164 Or. App. 543, 562-566 (1999); *Doe v. Sundquist*, 2 S.W.3d 919, 925-26 (Tenn. Sup. Ct. 1999); *Doe v. Sundquist*, 106 F.3d 702, 706-707 (6th Cir. 1997).

**D. Even If Birth Parents Have A Legitimate Right To Privacy In Their Children’s Birth Information, Adult Adoptees’ Interest In Discovering The Truth Of Their Origin Is A Compelling Competing Interest Which Justifies Disclosure.**

Even if a birth parent were able to meet the threshold requirement of a reasonable expectation of privacy, and thus demonstrate an arguably protectible privacy interest with regard to information concerning the birth parent’s connection to the adoptee, that interest would have to be balanced against the interests of the adoptee with regard to that information. *Hill*, 7 Cal.4th at 40. To complete the analysis, *Hill* requires that the privacy interests be balanced against other countervailing interests, because an “[i]nvasion of a privacy interest is not a violation of the state constitutional right to privacy if the invasion is justified by a competing interest.” *Hill* at 655-656.

As an initial matter, if a birth parent has a privacy interest in the connection between herself and her relinquished child, the adopted person has an identical interest, which has to date been ignored, but which now must be considered and balanced. What is at stake for both adoptive parent and adoptee is the connection between them, that is, a single connection looked at from both sides. Whatever degree of importance may attach to the birth parent’s desire to hide from and to avoid the relational consequences of that connection, the same degree of importance attaches to the adoptee’s desire to learn of, and perhaps to be able to experience the relational consequences of, that connection. Further, the birth parent had a crucial role in creating that connection, while the adoptee had none, *i.e.*, the birth parent’s actions created consequences that would foreseeably

affect the future well-being of the adoptee. Equity and ordinary principles of tort law thus favor the adoptee's interests.<sup>20</sup>

More compelling, however, is the adoptee's right to the truth about his or her origins. This right to personal autonomy is more than a competing interest, it is fundamental and compelling. In *Hill*, the California Supreme Court held that where a case involves "an obvious invasion of an interest fundamental to personal autonomy . . . a 'compelling interest' must be present to overcome the vital privacy interest." *Hill* at 34. The Court later affirmed that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe and of the mystery of life." *Academy of Pediatrics*, 16 Cal.4th at 333. An adoptee's right to access information about his or her origins implicates a fundamental personal autonomy interest in personhood and self-definition.<sup>21</sup> When weighed against a birth parent's presumed desire to keep the circumstances of the adoption permanently secret from the adult her child has become, there is simply no contest.<sup>22</sup>

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<sup>20</sup> The fact that the adoptee had no say whatsoever in the process by which his or her records were amended and/or sealed is obvious, of course, as at the time of amendment and/or sealing, the adoptee was a child, whose interests were presumably being represented by the state. But the current law ignores the equally obvious outcome of that fact: the adult that the child becomes must suffer the consequences of a decision that was made without his or her consent and which no longer can be said to serve his interests.

<sup>21</sup> See, e.g., Carolyn Burke, Note, "The Adult Adoptee's Constitutional Right to Know his Origins," 48 S. Cal. L. Rev. 11-96-1220 (1975) [Ex. N]; Cahn & Singer, 2 U. Pa. J. Const. L. at 191 ("What seems most objectionable about sealed birth records is not that the State is interfering with the decisional autonomy of adoptees but that, by controlling access to this information, the State is playing far too large a role in constructing an identity for them.")

<sup>22</sup> Indeed, adoptees have their own "informational" privacy interest in maintaining the accuracy of private information relating to themselves. Jurisprudence for the

(Footnote continued)

### III. CONCLUSION

In conclusion, closed adoption laws were a result of a now antiquated philosophy of shame associated with illegitimacy, sex and adoption. The result of this philosophy, based on now outdated social norms, was the introduction of a crude but stringent set of laws which buried a perceived societal problem by denying adoptees access to their original birth records, perpetuating the stigmatization associated with illegitimacy, relegating an entire class of citizens to second class status, and effectively victimizing the weakest participant – the child. To continue to abrogate adoptees’ rights is to perpetuate these effects for no justifiable reason.

As noted above, California law already allows an adoptee access to his or her birth records “for good and compelling cause.” Health and Safety Code § 102705. The California Legislature has the authority, and we submit, the duty, to put a long overdue end to the legacy of shame and to proclaim that the right “to define one’s own concept of existence, of meaning, of the universe and of the mystery of life” is good and compelling cause to allow all citizens, including adopted ones, access to the fundamental records of their origins.

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constitutional right to privacy emanates from the California Supreme Court case, *White v. Davis*, 13 Cal.3d 757, 775 (In Bank 1975). In *White*, the Court found that one of the four mischiefs to be remedied by adoption of the constitutional right to privacy was the “lack of a reasonable check on the accuracy of existing record.” The altering of the adoptee’s birth records happens at the time of birth of the adoptee or when the adoptee is adopted as a child. Under current law, the state has the power alter records relating to the adoptee. The altering of the information relates to adoptee, yet the adoptee has no control over its content. The adoptees, finally of adult age, should be entitled to obtain and control accuracy of private information relating to themselves.

Respectfully submitted,

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