

MOTION FOR RECONSIDERATION

Appellant, Christopher Shawn Miller (“Shawn”) asks the Court to reconsider this case. The Court should reconsider the decision because it was based on a fundamental misconception about adoption law that made the difference between affirmance and reversal. Mr. Miller explains his reasons for the reconsideration in more detail in the attached memorandum.

Respectfully submitted,

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IN THE SUPREME COURT OF OHIO

In re Adoption of H.N.R., : Case No: 2014-2201
A minor child :
: On appeal from the Greene
: County Court of Appeals
: Second Appellate District
:
: **ADOPTION INVOLVED**

MEMORANDUM IN SUPPORT
OF APPELLANT'S MOTION FOR RECONSIDERATION

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MEMORANDUM IN SUPPORT

The Court should reconsider its decision, which was based on the premise that the Court could not consider hypothetical questions of fact and injury. (Op. at ¶¶ 30-32.) Unlike other areas of law, the analysis of constitutionality of an adoption notice statute always begins with a hypothetical question: whether the notice statute is “likely to omit many responsible fathers.” *Lehr v. Robertson*, 463 U.S. 248, 263-264, 103 S.Ct. 2986, 77 L.Ed.2d 614 (1983):

“If this scheme were likely to omit many responsible fathers, and if the qualification for notice were beyond the control of an interested putative father, it might be thought procedurally inadequate. Yet, as all of the New York courts . . . observed, the right to receive notice was completely within Appellant’s control. By mailing a postcard to the putative father registry, he could have guaranteed that he would receive notice of any proceedings to adopt Jessica.”

The analysis is that simple. If the father and the statute in *Lehr* were to be replaced with the father and the statute in the present case, the analysis would proceed in the same way and demand a result in Appellant’s favor.

The first question is whether the statutory scheme would likely omit many unwed fathers who had taken some real world or legal responsibility for the child. That question *is hypothetical*. If the answer to that hypothetical question is “no,” but the unwed father still does not qualify for notice under the statute, then the question becomes whether the qualification for notice was completely within the unwed father’s control. In *Lehr*, the qualification for notice was not outside the putative father’s control because, though he did not fall within any of the substantive categories for notice, he

still could have registered at any time before the adoption was ordered. *Lehr*, 463 U.S. at 251 (“Before entering Jessica’s adoption order, the ... Court had the putative father registry examined.”) The notice statute was therefore not arbitrary, making the father’s ignorance of the requirement irrelevant. The final question in *Lehr*, therefore, was not whether the registry opportunity saved the unwed father, but whether it saved the statute from being arbitrary or outside the putative father’s control.

Ohio’s statutory scheme has no categories for notice except establishing paternity formally and filing in the OPFR. Shawn did not fit into any other substantive categories because no other categories existed. As in *Lehr*, the question then became whether the OPFR option saved the statute, not whether it saved Shawn.

As this Court opined, the OPFR option likely saves the statute in cases where the adoption petition is filed “less than 30 days after a child’s birth.” (Op. at ¶ 30.) But the OPFR option may not save the statute in the case of “an adoption petition that is filed well past the 30-day deadline.” (Op. at 36.) Shawn’s challenge was “as applied” merely to point out *that distinction*.

Finding arbitrariness in the case of an adoption petition filed well past the 30-day deadline therefore does not constitute an “advisory” opinion on a “hypothetical injury,” but a choate opinion on whether the statute eliminated Appellant’s opportunity as a putative father before it was imperative to do so. *Id.* at ¶ 36.) Applying the rules in *Lehr*, the United States Supreme Court would have found the Ohio statute arbitrary

because it had no *putative* father categories for notice qualification except a registry requirement with a 30-day post-birth filing deadline. The Supreme Court would then have found that the OPFR requirement was not in Appellant's complete control because, at the time adoption was sought, he was unable to "mail a postcard" to the OPFR. Had the OPFR filing deadline been commensurate with the filing of the adoption petition (as one example), the statutory scheme would have been saved by the OPFR as applied to early-filed adoption petitions, but not as applied to later-filed adoption petitions because the *opportunity interest* of the *putative father* was arbitrarily eliminated. That was all the "as applied" language in Appellant's proposition of law meant. Using that language is acceptable because the prejudice element that applies in other contexts, such as challenges to will notice statutes, does not apply the same way in challenges to adoption notice statutes.

Adoption lawyers on both sides of this issue will no doubt be confused by this Court's decision if it stands. One on hand, we have a statutory scheme that is "questionable" at a facial level, and then questionable at an "as applied" level if the unwed father learns of the OPFR in time to make a futile attempt at filing in it. On the other hand, if the unwed father learns of the registry *after* the adoption petition is filed, and therefore must make a facial challenge to the statutory scheme, then he can argue that the scheme is likely to omit many responsible fathers, an arbitrariness the registry does not cure. Because that is the same argument Appellant made here, the Court's

decision ultimately turned solely on an unartful use of the phrase “as applied” in his proposition of law.

Unwed fathers will rarely if ever be able to show the kind of prejudice that the majority insists they show. That is why the initial constitutional question must be hypothetical—because the opportunity to be heard is a valuable interest in itself and thus the legislature had the initial duty to try to include them fairly. The only thing that will change in future challenges to the Ohio adoption statutory scheme will be the use of the term “facial” instead of “as applied.” The arguments will remain exactly the same. The only way that the facial challenge will fail, in turn, is if the Court distinguishes between adoptions sought before and after the registration deadline passes. That illustrates how the decision here was too technical. A more real and substantively reasoned decision is needed.

CONCLUSION

Accordingly, the Court should reconsider its decision and ultimately reverse the Court of Appeals decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I sent a true copy of this Motion for Reconsideration and the Memorandum in Support by E-mail to Michael Voorhees, counsel for appellees, at < mike@ohioadoptionlawyer.com > on January 11, 2016.

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