IN THE IOWA SUPREME COURT

Supreme Court No. 12-0243

District Court No. CE 67807

IOWA DEPARTMENT OF PUBLIC HEALTH,

Respondent – Appellant.

vs.

HEATHER MARTIN GARTNER and **MELISSA GARTNER,** individually and as next friends of **MACKENZIE JEAN GARTNER**, a minor child,

Petitioners – Appellees,

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
THE HONORABLE ELIZA J. OVROM, JUDGE

PROOF BRIEF OF PETITIONERS – APPELLEES AND REQUEST FOR ORAL ARGUMENT

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II. WHETHER INTERPRETING IOWA'S BIRTH CERTIFICATE LAW AS PERMITTING DENIAL OF A TWO-PARENT BIRTH CERTIFICATE AND THE SPOUSAL PRESUMPTION OF PARENTAGE TO A CHILD BORN TO SAME-SEX SPOUSES WOULD RENDER IT UNCONSTITUTIONAL.

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ROUTING STATEMENT

As the court below held, this case concerns Respondent's erroneous interpretation and concomitant violation of the Iowa Code 144.13(2). Construed properly, this law is constitutional. While Iowa children's need for birth records that accurately reflect their legal parentage is certainly of broad public importance, the legal issues raised by this case are narrow in scope. Accordingly, the Iowa Supreme Court need not retain this case.

STATEMENT OF THE CASE

Petitioners are a lesbian couple, Heather Martin Gartner ("Heather") and Melissa Gartner ("Melissa"), together with their two year-old daughter, Mackenzie Jean Gartner ("Mackenzie") (collectively, "Petitioners"). Heather and Melissa married in Iowa on June 13, 2009. App.__(SMF ¶ 5[1]; SMF Ex. 1 (H. Gartner Aff.); Petition for Judicial Review of Respondent Agency's Failure to Issue an Accurate Birth Certificate to Mackenzie Jean Gartner

[1] "SMF" refers to the stipulated Statement of Material Facts in Support of Petition for Judicial Review, attached as Exhibit A to All Petitioners Memorandum of Authorities in Support of Petition for Judicial Review. At oral argument below, counsel for Respondent stipulated to the SMF, *see* App.__(Transcript at 3), but Respondent later clarified in correspondence to the court that Respondent disputes the SMF's use of the word "inaccurate" to describe Mackenzie's original birth certificate (SMF ¶¶ 15, 16, 17, 19, 23) and that Mackenzie's original birth certificate labeled her as an "illegitimate" child (SMF ¶ 24).

("Petition") Ex. A (Certificate of Live Birth)). On September 19, 2009, Heather gave birth to Mackenzie, who was conceived via anonymous donor insemination. App.__(SMF ¶ 6; SMF Ex. 1 (H. Gartner Aff.); Petition Ex. A (Certificate of Live Birth)). This Court should affirm the ruling of the court below that Respondent must issue Mackenzie a birth certificate listing both Heather and Melissa as her parents because of Heather's marriage to Melissa.

A mother's spouse is the presumed parent of a child born during the marriage. Iowa Code 252A.3, 598.31. Historically, the spousal presumption of parentage (sometimes referred to as a "marital presumption," or a presumption of "legitimacy") operated to make a mother's spouse a parent by operation of law, regardless of whether he shared a genetic connection to the child. See, e.g., *Callender v. Skiles*, 591 N.W.2d 182 (Iowa 1999). The presumption protected a child's right to inherit and to receive support from both spouses, prevented attacks on the integrity of the marital family, and shielded children from the stigma of what was termed "illegitimacy" or "bastardy." See, e.g., *Heath v. Heath*, 222 Iowa 660, 269 N.W. 761 (1937).

Now that same-sex couples may marry in Iowa, the spousal presumption applies to children born to same-sex spouses, just as it does to children of different-sex spouses. In *Varnum v. Brien,* 763 N.W.2d 862, 903 n. 28 (Iowa 2009), this Court specifically identified the spousal presumption as a

benefit of marriage improperly withheld from same-sex couples and their children as a direct result of Iowa's marriage ban before striking down the ban as unconstitutional. This Court also ordered that all statutory language in the Iowa Code referring to marriage "must be interpreted and applied in a gender neutral manner allowing gay and lesbian people full access to the institution of civil marriage." *Id.* at 907. Thus, Melissa is Mackenzie's presumed parent.

In accordance with the spousal presumption, Iowa Code 144.13(2) (hereinafter "birth certificate law") states:

> If the mother was married at the time of conception, birth, or at any time during the period between conception and birth, the name of the husband ***shall*** be entered on the certificate as the father of the child unless paternity has been determined otherwise by a court of competent jurisdiction, in which case the name of the father as determined by the court shall be entered by the department (emphasis added).

Thus, Iowa's birth certificate law permits Respondent no discretion concerning whether a birth certificate must reflect the spousal presumption. That a mother's spouse lacks a genetic connection to the child is irrelevant to the law's mandate. Indeed, the Attorney General has issued opinions dating back more than 60 years requiring Respondent to issue birth certificates listing the mother's husband as a child's second parent even where undisputed evidence showed that it was a biological impossibility for the husband to be the child's parent. App. __(Petition Exs. B (Attorney General Opinion, Au-

gust 7, 1945), C (Attorney General Opinion, July 16, 1945)). Accordingly, Iowa's birth certificate law has never functioned as a mere proxy for the establishment of a biological relationship.

Respondent argues that neither the spousal presumption of parentage nor the birth certificate law applies to children born to same-sex spouses because Iowa Code 144.13(2) uses the gendered terms "husband" and "father" rather than "spouse" and "parent." App. __(Answer at Ex. 1; Respondent's Brief at p. 13). However, given (1) the Court's holding in *Varnum*, (2) the existence of gender-neutral statutes elsewhere in the Code designating a child born to a married couple as a child of both spouses, (Iowa Code 252A.3, 598.3) (3) Iowa's strict requirement of gender neutrality in parenting matters, (4) Iowa's prohibition on differential treatment of children because of the status or conduct of their parents, and (5) Iowa's protection for family integrity and association even in non-traditional families, the birth certificate law must be interpreted in a gender neutral manner to apply equally to same-sex couples and their children. In other words, Iowa law requires that "husband" be read as "spouse," and "father" be read to mean "parent." Constitutionally, any other result cannot stand.

Proceedings below. Petitioners filed a Petition for Judicial Review of Agency Action on February 14, 2011, asserting that Respondent's denial of a two-parent birth certificate to Mackenzie is in violation of Iowa statutory

and decisional law (Iowa Code 17A.19(10)(b)); based on an erroneous interpretation of a provision of law whose interpretation has not clearly been vested in the discretion of the agency (Iowa Code 17A.19(10)(c)); and inconsistent with the agency's prior practice or precedents without credible reasons sufficient to indicate a fair and rational basis for the inconsistency (Iowa Code 17A.19(10)(h)). Additionally, Respondent's action is unconstitutional (Iowa Code 17A.19(10(a)), and, if the Court concludes that Iowa Code 144.13(2) should be construed as Respondent suggests, the statute is unconstitutional both on its face and as applied (*id*). Finally, as evidenced by the content of Respondent's letter denying Petitioners a corrected birth certificate and Respondent's discovery responses, Respondent's denial was motivated by an improper purpose (Iowa Code 17A.19(10)(e)) and is therefore unconstitutional on this ground, too.

After briefing and argument, the District Court ruled on January 4, 2012 that Respondent's denial of a two-parent birth certificate to Mackenzie violated Iowa law and was based on an erroneous interpretation of Iowa law. App. __(Ruling at pp. 11-12), citing Iowa Code 17A.19(10)(b) and (c). Mackenzie is deemed Heather's and Melissa's legitimate child under Iowa Code 252A.3(4) and 598.31, but "absent a birth certificate naming Melissa as a parent, she and the child are denied the primary means of proving legitimacy." App.__(Ruling at p. 8). The court opined that the purpose of the

presumption is "to protect the integrity of families, regardless of biological connections." App.__(Ruling at p. 11), citing *Callender,* 591 N.W.2d at 191 (Iowa 1999); *Craven v. Selway,* 246 N.W.2d 821, 823 (Iowa 1933); *Heath,* 269 N.W. 761; *Wallace v. Wallace,* 114 N.W. 527 (1908). The court further held that "[t]he Department's refusal to place Melissa's name on the birth certificate frustrates the purpose of the law to recognize the legitimacy of a child born to a marriage, and to establish the parents' obligation to support the child, as recognized in the *Varnum* decision." App.__(Ruling at p. 8).

The court also made the following findings:

- The parties agree that a birth certificate is the primary way to demonstrate legal parentage. App.__(Ruling at p. 2).

- The parties also agree that a birth certificate is relied upon and legally required to establish identity, age, and parentage in many contexts, including school, employment, travel, social security, marriage licenses, driver's licenses, professional licenses, insurance, banking, and medical care. App__ (Ruling at pp. 2-3).

- Without Melissa's name on the birth certificate, Melissa will be unable to prove that she is Mackenzie's legal parent. This will adversely affect her ability to authorize medical care for the child, or even to enroll her or pick her up from a childcare facility. App.__(Ruling at p. 3).

- Melissa will not be able to obtain access to Mackenzie's birth certificate, and would likely be denied health care coverage for the child on her policy. App.__(Ruling at p. 3).

- The Department does not dispute Melissa's claim that the process of adoption is intrusive, expensive, and time-consuming. It would in-

volve a home study and background check, plus the expenses of court fees, attorney fees, and a home study. App.__(Ruling at p. 3).

- Mackenzie was hospitalized in early 2010, when she was less than a year old. Melissa is the stay-at-home parent to Zachary and Mackenzie, and Heather works outside the home. Because Melissa could not prove she was a legal parent to Mackenzie, Heather and Melissa both maintained a bedside vigil for the child when she was in the hospital. They feared that Melissa would not be able to authorize emergency medical care if it became necessary. Heather had to miss a great deal of work she would not otherwise have had to miss. This situation caused additional stress and anxiety to Heather and Melissa, which would not have been necessary had Melissa been on the child's birth certificate. App.__ (Ruling at p. 3).

- The integrity of Heather and Melissa's family is promoted by allowing Melissa's name to be placed on the birth certificate. App.__ (Ruling at p. 10).

- It is in Mackenzie's best interest to have two legal parents, rather than one. She will be legally entitled to financial support from both parents, rather than one, to inherit from both parents, and to have two adults who will be able to act for her in important matters such as medical care and schooling. App.__ (Ruling at p. 10).

- The administrative burden of placing Melissa's name on Mackenzie's birth certificate is not onerous, and is no greater than for a woman married to a man. App.__ (Ruling at p. 10).

Respondent filed a notice of appeal on February 3, 2012, and moved to stay the decision of the court below. The court denied the stay as to Petitioners, but granted it with respect to other children born to same-sex spouses in need of accurate two-parent birth certificates. App.__(Ruling on Respondent's Motion to Stay Proceedings).

Petitioners respectfully request this Court to affirm the court below. To deny Mackenzie a birth certificate that accurately lists Melissa as her second parent would put a significant obstacle in the way of the family's economic, emotional, and physical security, and brand Mackenzie as "illegitimate." App.__(SMF Exs. 1, 9); Iowa Code 600B.35; Iowa Admin. Code 641-96.6(4). Respondent's refusal to acknowledge that children of same-sex spouses have two parents at birth serves only to punish children of same-sex couples for their parents' status, and to stigmatize them as less worthy than children of other families.

STATEMENT OF FACTS

Melissa and Heather have been in a loving, committed relationship since 2006, and live in Des Moines, Iowa. App. __(SMF Ex. 1 (H. Gartner Aff.), Ex. 2 (M. Gartner Aff.)). They decided together to have children. App.__(SMF Ex. 1 (H. Gartner Aff.). After conceiving via anonymous donor insemination, Heather gave birth to their son, Zachary Tyler Gartner, in 2007. App.__ SMF Ex. 1 (H. Gartner Aff.); Ex. 3 (Amended Birth Certificate of Zachary Tyler Gartner)). *Id.* Because Heather and Melissa were not legally married at the time of Zachary's birth, the couple performed an adoption to secure legally Melissa's parent-child relationship to Zachary, which was an expensive, intrusive, and laborious process. *Id.* After the adoption,

Respondent issued a birth certificate to Zachary naming both Heather and Melissa as his parents. *Id.*

The couple decided to have a second child, and Heather conceived again via anonymous donor insemination using the same anonymous donor. App.__(SMF Ex. 1 (H. Gartner Aff.)). Heather and Melissa married in Iowa on June 13, 2009. App.__(SMF Ex. 1 (H. Gartner Aff.); Petition Ex. A (Marriage Certificate)). Their daughter, Mackenzie, was born several months later in Des Moines on September, 19, 2009. App.__(SMF Ex. 1 (H. Gartner Aff.); Petition Ex. A (Certificate of Live Birth)).

Even though Melissa and Heather put both their names on the birth certificate worksheet at the hospital as Mackenzie's parents and indicated that they were married, Respondent sent the family a birth certificate that omitted Melissa's name. App.__(SMF Ex. 1 (H. Gartner Aff.), Ex. 2 (M. Gartner Aff.); Petition Ex. A (Certificate of Live Birth); Answer at ¶4). As the District Court's factual findings reflect, Respondent's denial of a two-parent birth certificate to Mackenzie already has caused Heather, Melissa, and Mackenzie significant harm. App.__(Ruling at pp. 2-3).

Birth certificates document a child's legal parent-child relationships, and not a child's genetic and biological relationships, as is clear from the myriad Iowa birth certificates issued after adoptions, use of reproductive technology, or a mother's sex with a non-marital partner. Birth certificates

often are required to prove a person's age, prove nationality, receive healthcare, enroll in school, take exams, be adopted, marry, open a bank account, hold a driver's license, obtain a passport, inherit, vote, report a child as missing, recover a lost child from law enforcement authorities, recover child support, establish a right to social security survivor benefits, bring a wrongful death claim, or stand for elected office. App.__ (Ruling at pp. 2-3; Respondent's Answer to Interrogatory No. 13)); SMF Ex. 8 (Official Worksheet to Establish Legal Certificate of Live Birth)). As Respondent concedes, lack of an accurate birth certificate poses significant and ongoing harm to a child and her parents, and renders the family vulnerable to future harm. App.__(Respondent's Reply to Request for Admissions No. 18; SMF Ex. 1 (H. Gartner Aff.) , Ex. 2 (M. Gartner Aff.), Ex. 8 (Official Worksheet to Establish Legal Certificate of Live Birth)).

ARGUMENT

I. The District Court correctly ruled that Respondent's refusal to issue a two-parent birth certificate to Mackenzie identifying Heather and Melissa as her parents in reliance on the spousal presumption violates Iowa law and is based on an erroneous interpretation of Iowa law.

Standard of Review.

A person adversely affected by action taken by a state agency may bring suit under the Iowa Administrative Procedure Act (Iowa Code 17A.1

et seq.) ("IAPA").[2] A court may reverse, modify, affirm, or remand to the agency for further proceedings if the agency's action is in violation of any provision of law or based on an erroneous interpretation of law whose interpretation has not clearly been vested in the agency, and a party's substantial rights have been prejudiced. IAPA 17A.19 (10)(b), (c); *Second Injury Fund of Iowa v. George,* 737 N.W.2d 141 (Iowa 2007).

The court below correctly concluded, and Respondent does not dispute on appeal, that the legislature in this case has not vested interpretation of the relevant statute (Iowa Code 144.13(2)) in Respondent. Therefore, a reviewing court may not give deference to the agency's interpretation. App. __(Ruling at pp. 5-6, citing *Renda v. Iowa Civil Rights Com'n,* 784 N.W.2d 8, 13-14 (Iowa 2010)); *see also* IAPA 17A.19(11) (court "[s]hall not give any deference to the view of the agency with respect to whether particular matters have been vested by a provision of law in the discretion of the agency," and "should not give any deference to the view of the agency with re-

[2] The standards that apply in an IAPA proceeding turn on the type of agency action at issue. Iowa courts have identified three types of agency action: 1) contested case hearings; 2) rule-making; and 3) the catch-all category of "other agency action." *Jew v. University of Iowa,* 398 N.W.2d 861, 864 (Iowa 1987). Respondent agrees that its challenged actions in this case fall within the catch-all description of "other agency action" under Iowa Code 17A.2(2) ("the performance of any agency duty or the failure to do so"). *See,* App. __(Answer at ¶12).

spect to particular matters that have not been vested by a provision of law in the discretion of the agency"); *Am. Eyecare v. Dep't of Human Servs.*, 770 N.W.2d 832, 835 (Iowa 2009). This Court applies the standards of IAPA 17A.19(10) to determine if the Court reaches the same result as the District Court. *Renda*, 784 N.W.2d at 10.

Preservation of Error

Petitioners agree with Respondent that the issues raised on appeal are preserved.

A. The district court correctly held that both Heather and Melissa are Mackenzie's presumed parents under Iowa's longstanding spousal presumption of parentage.

Under Iowa law, a child born to a married couple is presumed the "legitimate" child of both spouses. *See* Iowa Code 252A.3(4) (child born of married parents is considered child of both spouses for purposes of determining support obligations, and child "born of parents who, at any time prior or subsequent to the birth of such child, have entered into a civil or religious marriage ceremony, shall be deemed the legitimate child or children of both parents, regardless of the validity of such marriage"); Iowa Code 598.31 ("Children – legitimacy": "Children born to the parties, or to the wife, in a marriage relationship which may be terminated or annulled pursuant to the provisions of this chapter shall be legitimate as to both parties, unless the court shall decree otherwise according to the proof" and regardless of later

divorce); *see also, In re Marriage of Schneckloth,* 320 N.W.2d 535, 536 (Iowa 1982); *accord, Kuhns v. Olson,* 141 N.W.2d 925 (Iowa 1966); *State v. Shoemaker,* 17 N.W. 589 (Iowa 1883).[3]

As the District Court concluded, the plain text of both Iowa Code 252A.3 and 598.31 does not distinguish between same-sex and different-sex married couples. Both statutes apply on their face to Mackenzie and her family, making Melissa Mackenzie's presumed parent, and imposing on Melissa a parental obligation of support, among myriad other parental responsibilities.

The spousal presumption of parentage protects every child of married parents regardless of evidence that a spouse is not the child's genetic parent, or that a married couple is incapable of having children to whom they are genetically related. *See, e.g., In re Marriage of Steinke,* 801 N.W.2d 34 (Iowa Ct. App. 2011) (husband, who indisputably was not biological father to child born during parties' marriage, was the child's "estab-

[3] This presumption is rebuttable only by clear, strong, and satisfactory evidence on a preponderance of the evidence standard. *See Schneckloth*, 320 N.W.2d at 536. A putative father who wishes to rebut the spousal presumption must do more than show a biological connection to a child; he must demonstrate the development of a parental bond with the child in the child's best interests. *Huisman v. Miedema,* 644 N.W.2d 321 (Iowa 2002). Further, there is no possibility of a court determination establishing another person's paternity in this case because Mackenzie was conceived through anonymous donor insemination. App.__(SMF Exs. 1 (H. Gartner Aff.), 2 (M. Gartner Aff..)).

lished father" by operation of law as a result of the spousal presumption, and therefore the district court properly awarded him joint legal custody and visitation). For example, in *Callender v. Skiles*, 591 N.W.2d 182, 185 (Iowa 1999), a man who claimed to be the biological father of a child born to a married couple brought suit to establish paternity, requesting an order determining custody, visitation, and support. Even though test results ordered by the District Court demonstrated a 99.98% probability that the petitioner, and not the mother's spouse, was the child's genetic parent, this Court held that the mother's spouse was the "established father" of the child by virtue of the spousal presumption, citing both Iowa Code 252A.3(4) and the birth certificate statute at issue here, Iowa Code 144.13. *Id.* Consequently, the putative unwed father had no statutory standing to seek paternity, custody, or visitation, although the Court found that he had a due process right to a hearing to demonstrate whether he had established a relationship with the child in the child's best interest. *Id.* at 186.

Similarly, in *Huisman v. Miedema*, 644 N.W.2d 321 (Iowa 2002), a putative father brought an action to establish parentage with respect to a child born to a married couple. Although none of the parties disputed that the petitioner was the biological father, this Court affirmed dismissal of his case on the ground that he had no enforceable right to assert as a parent because he had waived his substantive interest in having a relationship with his

child by fostering solely a friendship with the child instead of a parent-child bond, and by neglecting to support the child in a formal way. *Id.* at 325. The Court opined that the significance of a biological connection to a child is solely that it offers a genetic parent an opportunity to develop a relationship with his offspring:

> If he grasps that opportunity and accepts some measure of responsibility for his child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie.

Id at 326 (citations omitted). Accordingly, the Court would not disturb the spousal presumption by permitting the putative father to proceed with his claim. *Id.*

Thus, that many same-sex spouses do not both have a biological connection to their child[4] makes no difference as to whether the spousal presumption applies to these families. As *Callender* and *Huisman, supra,* make

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[4] In an increasing number of cases, both members of a lesbian same-sex couple ***do*** actually share a biological connection to their child. *See, e.g., K.M. v. B.G.*, 117 P.3d 673, 675 (Cal. 2005) (one woman provided her ova, which then were fertilized by donated semen and implanted in her partner for gestation and birth); *In re J.D.M.*, 2004 WL 2272063, 2004-Ohio-5409 (Ohio App. 12th Dist. Oct 11, 2004) (same); Buntemeyer v. Iowa Department of Public Health, Polk County Dist. Ct. Case No. CV9041 (Petition filed February 28, 2012) (married lesbian couple achieved pregnancy after ovum of one spouse was fertilized with sperm from an anonymous donor and implanted in the womb of the other spouse).

clear, the spousal presumption has never functioned under Iowa law as a mere proxy for a genetic relationship. To the contrary, the primary purposes of the presumption were twofold.

First, it protected a child from the stigma of what historically was termed "illegitimacy" or "bastardy," which is a status that continues up until the present day to subject children to private bias and expressions of disapproval, even though it has diminished social and legal force. For example, in *Heath,* 222 Iowa 660, in holding that, "[w]hen a child is born in wedlock, the law presumes legitimacy," this Court described the rule as "founded on decency, morality, and public policy." *See, also*, *Bowers v. Bailey,* 21 N.W.2d 773, 775 (Iowa 1946) (same). The *Heath* Court explained, "By [this] rule, the child is protected in his inheritance and safeguarded against future humiliation and shame." *Heath,* 269 N.W.2d at 761.

Second, the presumption served to preserve a child's bond with the presumed father against attack by someone outside the marital family who claimed a genetic connection to the child. *See, e.g.*, *Callender,* 591 N.W.2d at 191-92 (describing state interests favoring application of spousal presumption to protect husband's parental status against claim by genetic father, as "preserving the marital family" and "the best interests of the child," and noting that "[t]here may also be interests of other children in the family at stake"); *Heath,* 269 N.W.2d at 761 (under the spousal presumption, "the

family relationship [between a child and the mother's spouse] is kept sacred and the peace and harmony thereof preserved"); *see also Michael H. v. Gerald D.*, 491 U.S. 110, 124 (1989) (plurality opinion) (purpose of the presumption is to protect children from a declaration of illegitimacy, and to protect the peace and tranquility of families); Linda S. Anderson, *Protecting Parent-Child Relationships: Determining Parental Rights of Same-Sex Parents Consistently Despite Varying Recognition of their Relationship*, 5 Pierce Law Review 1, 8 (2006) ("Originating in the common law of England to prevent children from losing their inheritance and succession rights, the presumption was also meant to protect the integrity of families, regardless of the biological connections").

In other words, the presumption existed for child-centered reasons to protect children and their bonded relationships to the individuals who parent them day-to-day regardless of biology ***precisely because*** there is a possibility that these individuals may not be genetic parents. *See, also,* Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth Century America* 220 (Univ. of North Carolina Press 1985) (tracing history of spousal presumption of parentage, and emphasizing that the presumption elevated child welfare over other interests). These justifications and other oft-stated reasons for the marital presumption of parentage, including protection of a child's right to financial support against a husband's claim that he

is not a biological parent, and protecting the public purse by ensuring that both spouses are on the hook for child support, apply equally to same-sex couples.

The language in *Varnum v. Brien* makes additionally clear that the spousal presumption now protects the security of parent-child relationships of children born to married same-sex couples. In striking down the exclusion of same-sex couples from marriage as unconstitutional, this Court specifically identified Iowa Code 252A.3(4), which gives effect to the spousal presumption, as a benefit of marriage improperly withheld from same-sex couples as a direct result of the marriage ban. *Varnum*, 763 N.W.2d at 903 n. 28 (citing statute as example in footnote to the sentence, "Certainly, Iowa's marriage [ban] *causes* numerous government benefits . . . to be withheld from Petitioners") (emphasis added). This statement makes clear that, now the marriage ban has been struck down, the spousal presumption applies to same-sex couples just as it does to different-sex couples. *See also, Goodridge v. Department of Public Health*, 798 N.E.2d 941, 956-57 (Mass. 2003) (similarly identifying "presumptions of legitimacy and parentage of children born to a married couple" as benefits of marriage improperly denied to plaintiffs and their children by Massachusetts marriage ban, and ordering marriage licenses issued to same-sex couples); *Lewis v. Harris*, 908 A.2d 196, 216 (N.J. 2006) (finding state's domestic partnership scheme unconsti-

tutional, in part because it failed to provide "a comparable presumption of dual parentage to the non-biological parent of a child born to a domestic partner").

Further, this Court in *Varnum* not only struck down the gendered entry requirement for marriage in Iowa Code 595.2, but also ordered that "the remaining statutory language must be interpreted and applied in a manner allowing gay and lesbian people full access to the institution of civil marriage." *Varnum,* 763 N.W.2d at 907. That this Court went further than ordering solely the issuance of licenses underscores that marriage licenses issued to same-sex couples are not just symbolic; each of the "over two hundred" rights and obligations incident to valid marriages under Iowa law now benefit same-sex couples and their children, including but not limited to those singled out by this Court in *Varnum*, such as the spousal presumption. *Id.* at 903. Indeed, as described further below, Iowa's constitutional equality guarantees require nothing less. *See* Point IIA, below.

In *Varnum,* this Court identified numerous child-centered reasons for striking down Iowa's marriage ban. For example, the Court stated that the "ultimate disadvantage" of the marriage ban was that it prevented the plaintiffs from being able "to obtain for themselves ***and for their children*** the personal and public affirmation that accompanies marriage." *Id.* at 873; *see also id. at* 883 ("Plaintiffs are in committed and loving relationships, many

raising families, just like heterosexual couples," and "[s]ociety benefits . . . from providing same-sex couples a stable framework within which to raise their children"); *id* at 901 ("children of gay and lesbian parents . . . are denied an environment supported by the benefits of marriage" as a result of the marriage ban). This Court thus expressed the intent to extend marital child-related benefits to the children of same-sex couples in striking down the marriage ban. *See, also,* Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era,* 86 Boston Univ. L. Rev. 227, 231 (2006) (referring to the presumption of legitimacy as "an important incident of marriage").

This Court in *Varnum* also dismissed arguments that a different-sex couple's ability to procreate through sexual intercourse justified preferential treatment of traditional family structures or the exclusion of same-sex couples and their children from benefits associated with marriage. *Varnum,* 763 N.W.2d. at 899-901. Additionally, this Court expressly rejected justifications for the marriage ban that derived from unfounded and biased notions that men and women parent differently, or that a child needs a mother and a father to develop healthily. *Id.* at 899. After reviewing the social science concerning the quality of gay and lesbian parenting and outcomes for children of same-sex parents, the Court concluded that "the interests of children are served equally by same-sex parents and opposite-sex parents," and that

"the traditional notion that children need a mother and a father to be raised into healthy, well-adjusted adults is based more on stereotype than anything else." *Id.* The Court thus directed that, going forward, same-sex spouses and their children should stand on an equal footing under Iowa law relative to different-sex spouses and their children with respect to any benefit or protection associated with marriage – regardless of parental gender or sexual orientation. That same-sex spouses are unable to procreate without the assistance of reproductive technology cannot justify depriving their children of the same security of a presumed parent-child relationship at birth that children of different-sex spouses enjoy regardless of whether they were conceived through intercourse with a spouse, assisted reproductive technology, or intercourse with a non-marital partner.

Varnum is consistent with prior Iowa case law that long sought to weed out differential treatment of men and women in laws regulating parenting and child welfare. *See In re Marriage of Hansen*, 733 N.W.2d 683, 693, 700 (Iowa 2007) (because family structures have become more diverse and many spouses do not adopt "'traditional' roles" in childrearing, courts adjudicating child custody must avoid gender bias and advance "gender neutral goals of stability and continuity with an eye toward providing the children with the best environment possible for their continued development and growth"); *see also Heyer v. Peterson*, 307 N.W.2d 1, 7 (Iowa 1981); *In re*

Marriage of Fennell, 485 N.W.2d 863, 864 (Iowa Ct. App. 1992) (court careful to avoid sexual stereotypes in appeal by working mother of custody award to stay-at-home father); *In re Marriage of Kramer*, 297 N.W.2d 359, 361 (Iowa 1980) ("[N]o assumptions are warranted based on the gender of parent or child").[5] Thus, Iowa courts have rejected claims that the security of a parent's relationship with his or her child turns upon parental gender.

Iowa courts also have prohibited discrimination based on sexual orientation in parenting matters. *See, e.g.*, *In re Marriage of Kraft*, 2000 WL 1289135 (Iowa App. 2000) (refusing to limit gay ex-husband's visitation and to require dissolution decree to specify how and when ex-husband could speak to children about his sexual orientation); *In re Marriage of Cupples*, 531 N.W.2d 656 (Iowa App. 1995) (treating parent's sexual orientation as "nonissue"); *In re Marriage of Walsh*, 451 N.W.2d 492, 483 (Iowa 1990) (restriction on visitation with gay father "to times when 'no unrelated adult' is present" is inappropriate in light of statutory goal of keeping children in close contact with both parents); *Hodson v. Moore*, 464 N.W.2d 699 (Iowa App. 1990); *In re Marriage of Wiarda*, 505 N.W.2d 506, 508 (Iowa Ct. App.

[5] Iowa courts also have demonstrated in other contexts that use of sexual stereotypes is itself sex discrimination and improper. *Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Comm'n*, 453 N.W.2d 512, 521-22 (1990).

1993); *see also Hartman by Hartman v. Stassis*, 504 N.W.2d 129, 133-34 (Iowa Ct. App. 1993).

Additionally, numerous federal and Iowa cases make clear that the State may not impose penalties or burdens on children because of the status or conduct of their parents. *See, e.g., Levy v. Lousiana*, 391 U.S. 68, 72 (1968); *Weber v. Aetna Ca. 7 Sur. Co.*, 406 U.S. 164, 175 (1972) ("imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing"); *Mathews v. Lucas*, 427 U.S. 495, 505 (1976) ("visiting condemnation upon the child in order to express society's disapproval of the parents' liaisons 'is illogical and unjust'"); *Pickett v. Brown*, 462 U.S. 1, 7-8 (1983); *Gomez v. Perez*, 409 U.S. 535, 538 (1973); *State ex rel. Rake v. Ohden*, 346 N.W.2d 826, 829 (Iowa 1984).

Further, Iowa law recognizes in numerous contexts that parenthood means more than biology. *See, e.g.,* Iowa Code 600A.2 (defining "child" and "parent" as including those "by birth or adoption"). Indeed, as evidenced by Iowa's adoption laws, non-biological parent-child relationships deserve as much respect as relationships that result from parenthood by birth. Iowa Code 633.223 (adopted child is treated in the same manner as biological child for purposes of inheritance); Iowa Code 600.13 (adoption creates parent-child relationship "deemed to have been created at the birth of

the child"); *see also Huisman*, 644 N.W.2d 321; *Michael H.*, 491 U.S. at 126-27 (plurality opinion) (noting distinction between biological fatherhood and determination that one is a parent); *Prince v. Massachusetts*, 321 U.S. 158 (1994) (aunt and legal guardian enjoyed parental autonomy rights); *Caban v. Mohammed*, 441 U.S. 380, 397 (1979) ("Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring") (Stewart, J., concurring); *Lehr v. Robertson*, 463 U.S. 248, 260 (1983) (citing same). Thus, Iowa law does not permit privileging children with a biological parent-child relationship over children with other kinds of legal parent-child relationships. Consequently, to permit solely children who may have a genetic connection to a mother's spouse the benefit of a spousal presumption of parenthood, while denying the presumption to children who are assumed not to have such a genetic connection, would violate this basic principle.

These issues are not abstract or theoretical to many families. Most new parents count on being able to seek parental leave from an employer or put a child on a health insurance policy based on the assumption that a child born into their marriage will be considered their child, and that they will not have to demonstrate parentage by DNA in order to qualify for these benefits immediately upon the child's birth. The spousal presumption, which attach-

es immediately upon the birth of a child, is consistent with this common sense understanding of parenthood.

B. The district court correctly held that, in accordance with Iowa's spousal presumption of parentage, Iowa Code 144.13(2) requires entry of Melissa's name on Mackenzie's birth certificate.

Iowa's birth certificate law gives effect to Iowa's spousal presumption by mandating that Respondent "***shall***" enter the name of a mother's "husband" on a child's birth certificate as the child's "father." Iowa Code 144.13(2) (emphasis added). The words "husband" and "father" in Iowa Code 144.13(2) must be read to mean "spouse" and "parent," both because the spousal presumption now applies equally to all children – regardless of whether they are born to married same-sex or different-sex couples – and because Iowa law requires that rules governing marriage and parenting be applied in a gender- and sexual orientation-neutral manner. *See* Point IA, above.

Respondent claims that it may disregard its statutory mandate when application of the spousal presumption of parentage would result in a birth certificate that "list[s] as a parent a person for whom it is a biological impossibility to father a child." App. __(Answer at Ex. 1). However, Iowa Code 144.13(2) has never served as a proxy for biology. To the contrary, as two Attorney General opinions dating back more than 60 years make clear, this

law always has required insertion of the mother's spouse's name on a birth certificate ***even in cases where it is clear that the child is not and cannot be the biological child of both spouses***. *See* App.__(Petition Ex. B (Attorney General Opinion, August 7, 1945) ("A child born in wedlock, conceived prior to marriage is presumed to be a child of persons married" even when the mother's husband was overseas and had no access to the mother at the time of conception; ***"[t]he mother's husband's name should appear on the birth certificate even though he is not the real father")*** (emphasis added); *see also,* App.__(Petition Ex. C (Attorney General Opinion, July 16, 1945) (opining that birth certificate of child born to married parents ***must*** show husband as child's parent even when mother's request for certificate was accompanied by written statements from both mother and unwed putative father stating that: 1) they had engaged in intercourse leading to child's conception; 2) husband was not father; and 3) husband was serving continuously overseas for more than a year prior to birth of child). Even under these circumstances, the Registrar may not ignore "the legal presumption of legitimacy arising from a birth in wedlock." *Id.* at 67.

Respondent admitted below that Iowa Code 144.13(2) continues to require Respondent "to issue a birth certificate naming both spouses as parents to a child born to a married different-sex couple even when the husband is not the genetic parent of the child, such as when a child is conceived

through anonymous donor insemination." *See* App. __(Respondent's Reply to Request for Admissions No. 4). A husband never has had to demonstrate either the biological capacity to procreate or access to his wife for his child to receive a birth certificate listing his name. A husband's actual fertility and ability to engage in sex are simply irrelevant. As Respondent itself states, "If a woman is married, her husband shall be entered as the father of the child on the certificate of birth – and no additional inquiry, paternity testing, or court or administrative intervention is required." App. __(Respondent's Answer to Interrogatory No. 13). "The Respondent has no policy, practice, or procedure for . . . seeking information regarding whether the child has a biological connection to the husband of a married woman." App. __(Respondent's Answer to Interrogatory No. 7).[6]

[6] Respondent now asserts for the first time on appeal that if a mother refuses to provide her legal husband's information on the birth certificate worksheet because he is not the biological father of the child, Respondent disregards the mandate in Iowa Code 144.13(2), and declines to place the name of the father on the certificate. Respondent's Brief at 16. The birth certificate worksheet used by Respondent to gather information from mothers in the hospital contradicts this assertion, as it specifies that a mother's refusal to identify her husband as the father must be accompanied by a court order naming paternity in someone else. App.__ (SMF Ex. 8 (Official Worksheet to Establish Legal Certificate of Live Birth)). To the extent that Respondent does simply ignore Iowa Code 144.13(2) at a mother's behest, then this is improper. Iowa Code 144.13(2) does not permit Respondent such discretion. Respondent may not facilitate one parent's effort at birth to deprive a child of the child's second legal parent, putting a significant practical obstacle in the way of the child's future ability to obtain the emotional and fi-

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Further, in the context of surrogacy arrangements, Respondent expressly has recognized that Iowa Code 144.13(2) requires Respondent to place a mother's spouse's name on a birth certificate despite lack of any genetic connection to the child, and even though the mother's spouse does not intend to be a parent. Guidance documents issued by Respondent for "Surrogate & Gestational Carrier Births" state that, in order for a biological father's name to appear on the birth certificate of a child born as a result of a surrogacy arrangement, the biological father must obtain a court order dis-establishing the parentage of the surrogate's spouse:

> If the [surrogate] IS married, a court order dis-establishing her legal husband as the father must accompany the Voluntary Paternity affidavit [executed by the biological father]. This complies with the Code of Iowa, section 144.13(2) that recognizes only the legal husband of the birth mother as the legal father.

See "Surrogate & Gestational Carrier Births," dated Nov. 2009 (emphasis in original), at App.__(SMF Ex. 7 (Surrogate and Gestational Carrier Births)).[7]

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nancial support of the second parent. While there may be practical difficulties in obtaining information about a mother's spouse's identity if the couple married outside of Iowa and the mother refuses to provide it, Respondent has no authority to refuse to place it on a birth certificate if Respondent has access to it or can obtain it.

[7] In the absence of any statutory or case law guidance in Iowa about surrogacy arrangements, Respondent apparently follows a working presumption that all women who give birth are parents, including gestational surrogates who have no genetic connection to the child, do not intend to parent, and have committed to turn over the child to the intended parent(s) after the

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The District Court correctly concluded that Respondent must follow this body of law and historical practice in Mackenzie's case as well. To construe Iowa Code 144.13(2) otherwise would undermine accuracy in Iowa's vital records. If the children of married same-sex couples do not receive birth certificates listing both spouses as parents, a class of Iowa birth certificates will be inaccurate because certificates for these children will omit the names of the children's legal parents.

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birth. However, in many other states, courts, agencies, and legislatures have determined that a surrogate is not a parent, and that her name does not go on a birth certificate in the absence of a court order. *See Raftopol v. Ramey,* 12 A.3d 783 (Conn. 2011) (intended parent, who is neither the biological nor adoptive parent, is the legal parent pursuant to a gestational surrogacy agreement; ordering state department of public health to issue replacement birth certificate listing solely two men as parents, and omitting the name of the surrogate); "Illinois Gestational Surrogate Act," 750 ILCS 47/15; Illinois Vital Records, *Surrogate Parentage*, available at http://www.idph.state.il.us/vitalrecords/surrogateinfo.htm (last visited May 21, 2012) ("The names of the gestational surrogate and the gestational surrogate 's husband, if any, are not placed on the birth certificate"); *see, also,* Unif. Parentage Act 801(a) (2002). In other words, the presumption that a person who gives birth is a parent is rebuttable, and a surrogacy agreement is sufficient in some jurisdictions to rebut the presumption. Because Iowa contains no specific directive to Respondent in case law or statute concerning how to treat surrogacy arrangements, Respondent could adopt the practice, endorsed by the Uniform Parentage Act, of issuing a birth certificate to a child born of a surrogate that lists solely the gay biological father and his male spouse as parents in reliance on the spousal presumption. Of course, in this case, Petitioners do not challenge Respondent's procedures for issuing birth certificates in the context of surrogacy, and the Court need not reach this issue. Petitioners point this out simply to show that the spousal presumption of parentage has potential application to gay men as well as lesbians.

Respondent cites several reasons, all erroneous, for interpreting Iowa Code 144.13(2) as inapplicable to Mackenzie and her family. First, Respondent argues incorrectly that this statute is "founded on the belief that the birth mother's husband is the genetic father." Respondent's Brief at 14. However, Respondent's sole citation for this theory is a law review article, *see* Byrn and Ives, *Which Came First the Parent or the Child,* 62 Rutgers L. Rev. 305, 333 (Winter 2010). This article does not concern birth certificates or Iowa law, let alone Iowa's birth certificate law, which it does not even cite. The apparent purpose of the article is to elaborate on the author's idiosyncratic notion that all new fathers should undergo DNA testing at the hospital shortly after the birth of their babies so that their children may be reassigned if the would-be father turns out not to be the child's genetic parent, *id.* at 338-39, which makes the article a curious choice of authority from which to draw policy conclusions about the purpose underlying an Iowa parentage statute. In addition, contrary to Respondent's characterization, the article acknowledges expressly that the spousal presumption of parentage developed for reasons that have nothing to do with identification of a child's genetic father:

> The marital presumption initially served to protect the husband and his family from the specter of infidelity and social disapproval. In addition, the marital presumption protected the child from the stigma of illegitimacy. At the time the marital presumption was codified, child-

> ren of married parents earned significant social and financial benefits, whereas non-marital children suffered severe hardships.

Byrn and Ives, 62 Rutgers L. Rev. at 336.[8]

Respondent next argues that *Varnum* should have no impact on the proper construction of Iowa Code 144.13(2) because *Varnum* "did not expressly address the issuance of birth certificates" or cite the birth certificate law expressly. Respondent's Brief at 38-43. In Respondent's view, *Varnum* did little more than eliminate gendered entry requirements to obtaining a piece of paper titled a marriage license, but does not necessarily guarantee access to tangible marital protections and benefits. Indeed, Respondent contends that Iowa statutes conferring marital benefits that "impact third parties" continue to exclude same-sex spouses. Respondent's Brief at p. 42 ("[I]t is improper to expand *Varnum* to attack statutes which impact parties outside the marriage civil contract: for example, those which affect third par-

[8] In arguing that its construction of Iowa Code 144.13(2) serves the interest of accurate identification of genetic parents, Respondent makes the unsupportable claim that placement of a mother's husband on a birth certificate results in accurate identification of the child's biological father 95% of the time. In support, Respondent cites only [Kermyt]. This article concerns cross-cultural comparisions of male confidence in their own paternity, but does not say anything about married men, the spousal presumption, about Iowa, or anything about birth certificates. It also says nothing about the use of reproductive technology. In short, it is completely inapposite. Kermyt Anderson, *How Well Does Paternity Confidence Match Actual Paternity?*, 47 Current Anthropology 3 (June 2006).

ties such as the actual biological parent of a child and the child him or herself"). Respondent believes *Varnum* created a kind of "marriage-lite" for same-sex couples, and would negate numerous benefits of marriage, solely for same-sex couples and their children, on the theory that the two paragraphs of the *Varnum* opinion titled "Remedy" did not mention each benefit expressly, or that the marital benefit at issue accorded the couple a benefit with respect to a third party, such as their own child. This interpretation defies the central holding of *Varnum*, and, as discussed more fully below, is inconsistent with both the liberty and equality guarantees in Iowa's constitution.

Respondent also argues that the District Court erred in reconciling the interpretation of Iowa's birth certificate law with Iowa Code 252A.3 and 598.31 because these statutes "are administered for distinct purposes," and fall outside the vital statistics chapter, and therefore Respondent should be free to ignore them. Respondent's Brief at pp. 29-38. Respondent cites no authority for the novel notion that it has no obligation to follow laws in chapters other than the one that it administers directly. A state agency may not construe one chapter of the Iowa Code in a myopic fashion as though no other laws exist, interpreting provisions in ways that directly conflict with Iowa Code provisions elsewhere. Instead, an agency must adhere to all Iowa law – statutory, decisional, and constitutional.

One might think, based on Respondent's Brief, that the birth certificate statute reads: "The Department shall place on a child's birth certificate its best guess as to the child's genetic parents." It does not. Respondent's insistence on privileging genetic connections over legal relationships reflects an inaccurate understanding of the purpose and significance of birth records. *See, e.g., Raftopol v. Ramey*, 12 A.3d 783, 789 (Conn. 2011) ("A birth certificate is a vital record that must accurately reflect *legal* relationships between parents and children") (emphasis added). For example, a child's adoptive parent(s) appear on the child's birth certificate, and the birth certificate makes no indication that the child is adopted. *See, e.g.* Iowa Admin. Code 641-100.6 (adopted child's birth parents do not appear on the birth certificate); App. __(SMF Ex. 3 (Amended birth certificate of Zachary Tyler Gartner), issued after his adoption by Melissa, and containing no reference to his adoption). Additionally, birth certificates do not document whether a child lacks a genetic connection to one or both parents because the parents used reproductive technology, such as a sperm donor or donated ovum. *Id.* Further, birth certificates do not reflect whether a child lacks a genetic connection to his or her father as a result of a mother's intercourse with someone outside the marriage.

C. Respondent's denial of an accurate birth certificate caused harm to Petitioners and harms other Iowa same-sex spouses and their children.

Respondent's refusal to issue Petitioners an accurate birth certificate denied Petitioners crucial proof of Mackenzie's identity, burdened Petitioners in their daily lives, and threatened more serious injury in the future. Because birth certificates constitute official documentation of a child's legal, rather than biological, parentage, they are essential in myriad contexts for parents and children to demonstrate their legal relationships to each other.[9] Indeed, birth certificates have become the currency through which children experience the security of family; a birth certificate is a universally recognized document used to prove a child's identity and parentage. *See, e.g.,* Office of the Inspector General, *Birth Certificate Fraud*, at i, March 1988, available at http://oig.hhs.gov/oei/reports/oai-02-86-00001.pdf (last visited May 21, 2012) (birth certificate is "the key to opening many doors in our society – from citizenship privileges to Social Security benefits").[10]

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[9] *See, e.g.,* App.__(SMF Ex. 8 (Official Worksheet to Establish Legal Certificate of Live Birth) instructing new parents that a birth certificate "legally proves your baby's identity, age, parentage, and U.S. citizenship," and states, "Your baby will use this legal record all his or her life").

[10] Because birth certificates are essential to demonstrate parentage, an accurate birth certificate is recognized internationally as fundamental to a child's security. *See, e.g.,* United Nations Children's Fund, *Birth Registration Right from the Start*, Innocenti Digest No. 9, at 2 (Mar. 2002) (referring to an accurate birth certificate for children as a "fundamental human right," and de-

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Respondent admits that "the omission of the name of one of a child's two legal parents on the child's birth certificate can cause harm to the child and/or the parents." App.__(SMF Ex. 5 (Respondents' Reply to Petitioners' Requests for Admissions No. 18)). Indeed, lack of a birth certificate already has created problems for the family, such as when Mackenzie was hospitalized in intensive care or recovering from surgery, and Heather could not leave her side for fear that Melissa would not have authority to make medical decisions. App. __ (Ruling at p. 3); SMF¶¶ 15-17, 19-20, 24).[11]

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scribing it as "the most visible evidence of a government's legal recognition of the existence of a child as a member of society. If a child is not registered at birth and has no birth record, he or she will not have a birth certificate with that all-important proof of their name and their relationship with their parents and the state.").

[11] – Iowa hospitals afford parents substantial discretion in making medical decisions for their children. The patients' bill of rights from Iowa Health-Des Moines illustrates this. Iowa Health – Des Moines, *Patient Handbook & Guide to Guest Services* (2010), available at http://www.iowahealth.org/filesimages/For Patients/Patient-Handbook-IowaHealth 2010.pdf (last visited May 21, 2012). Parents have rights to be consulted before procedures are performed on their child, to be notified if their child is admitted to the hospital, and to refuse treatment for their child. *Id.* at 4-6. Parents have the right to know who is treating their children, and to allow visitors into the hospital. Iowa Health – Des Moines, *Parent Rights*, available at http://www.blankchildrens.org/parent-rights.aspx (last visited May 21, 2012). Parents are allowed access to their child's medical records, which are otherwise sealed and confidential. Iowa Health – Des Moines, *New Patient Information*, available at http://www.blankchildrens.org/parent-rights.aspx (last visited May 21, 2012). It is the policy of Iowa Health-Des Moines to solicit the permission of each child's parents or guardian before performing medical research involving greater than minimal risk on minor

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The couple would have preferred to share these responsibilities in order to avoid having Heather miss as much work because of concerns about Heather's job security. App.__(SMF ¶ 17; SMF Ex.1 (H. Gartner Aff.)). Melissa also cannot perform such parental functions as enrolling Mackenzie in school, and needs Heather's authorization to pick up their daughter, establish Melissa as an emergency contact, or give permission for special activities. App.__(SMF ¶¶ 16, 20; SMF Ex. 1 (H. Gartner Aff.); SMF Ex.2 (M. Gartner Aff.); Respondent's Answer to Interrogatory, No. 13); Respondent's Reply to Request for Admissions No. 18). As with medical decisions, a parent not named on a birth certificate runs the risk of being treated as a legal stranger unauthorized to provide these parental functions for her child, and her child is deprived of parental protection.[12]

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patients. Iowa Health – Des Moines, *Policy & Procedures for Human Research Protections & Operation of the Institutional Review Boards*, Feb. 2012, available at http://www.iowahealth.org/policies-and-regulations.aspx (last visited May 21, 2012). Parents not listed on a child's birth certificate run the risk of being ignored or shut out of basic medical decisions that might determine the health of their child. At the very least, necessary health procedures might be delayed while medical personnel try to confirm a parent's status in the absence of a birth certificate, which causes unnecessary risk to the child.

[12] Schools require a parent to present a birth certificate before a child may be enrolled in kindergarten or first grade. Iowa Code Ann. 282.3 (2011); *see, also, e.g.*, Ames Comm. Sch. Dist., *Enroll Your Child*, available at http://www.ames.k12.ia.us/EnrollForms11.html (last visited May 21, 2012). School districts require parental consent and signatures on many documents

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Even if Heather and Melissa can explain the discrepancies in the birth certificate and establish Melissa's equal claim to exercise control over Mackenzie's care and custody, having to do so is likely to invade their privacy. App.__(SMF ¶ 21; SMF Ex. 1 (H. Gartner Aff.)). Melissa should not have to explain to anyone who may question her relationship to her daughter that Mackenzie was born to Heather through anonymous donor insemination after Heather's marriage to Melissa – but these are the facts that Melissa will be forced to relate in the absence of an accurate birth certificate. *Id.* Neither Heather nor Melissa want to rear Mackenzie to think that her relationship with Heather is any different from her bond to Melissa, and they worry that

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involving the health and welfare of children while at school. Parents are listed as emergency contacts in the event emergency care must be provided to their child at school. *See, e.g.*, Cedar Rapids Community School District, *Policies, Regulations & Procedures* (2011), available at http://www.cr.k12.ia.us/aboutUs/BoardOfEd/supportDocs/PolicyHandbook/PolicyHandbook.pdf (last visited May 21, 2012). A parent must provide a school written authorization for the administration of medication to students. *Id.* at 264. A parent must sign an authorization form for a child to self-medicate when the child suffers from asthma or other airway constricting diseases. *Id.* Various school outings and field trips require parental consent and signatures. Parents are allowed access to their child's school records, and the right to meet with school administrators to challenge those records. Iowa Code 22.7. Non-parental guardians require written identification to access such records. *Id*; *see also,* Cedar Rapids Community School District, *Policies, Regulations & Procedures* (2011) at 275. Parents receive notification when a student has been suspended or expelled. *Id.* at 249. Parents also have the right to attend any disciplinary fact-finding conference or hearing and challenge proposed disciplinary action. *Id.* at 250.

if Mackenzie observes Melissa in various contexts struggling to assert that she is a parent, Mackenzie will absorb the message that her relationship to Melissa is insecure, not as strong, or less sanctioned. App.__(SMF ¶ 22; SMF Ex. 1 (H. Gartner Aff.), SMF Ex. 2 (M. Gartner Aff.)). They also want Mackenzie to understand that she is just as loved and valued as any other child, and they fear that when she gets older and learns why Melissa is not on her birth certificate, she will internalize the message that the state does not value her, her family, or her parents' marriage as much as it values other families. *Id.*

Melissa and Heather share fears for the future, such as whether Melissa will be able to place Mackenzie on her health insurance policy. App.__(SMF ¶¶ 19, 23; SMF Ex. 1 (H. Gartner Aff.), SMF Ex. 2 (M. Gartner Aff.)). The U.S. State Department requires birth certificates to issue a passport for a child under 14 years of age, and many countries require a parent traveling with a minor child to provide the child's birth certificate as well as the passport.[13] App.__(Respondent's Answer to Interrogatory, No. 13). Birth certificates also are used to determine eligibility for Social Security

[13] Minors traveling outside the United States by air must present a birth certificate with his or her parents' names listed. Des Moines International Airport, available at http://www.dsmairport.com/travelPreparation/internationalTravel/ (last visited May 21, 2012).

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and other benefits for a surviving child. *Id.* Financial institutions ask for birth certificates to conduct financial transactions for a minor child, such as setting up an account in a child's name or for the benefit of a child. *Id.* Insurance companies request birth certificates to determine a child's eligibility as a beneficiary or to verify a child's entitlement to a parent's pension or other retirement benefits. *Id.*

Birth certificates often are most essential when a family goes through economic hardship, or after unforeseen family tragedies or crises. If Heather should die or become incapacitated, Melissa would have particular difficulty establishing in various contexts that she is Mackenzie's parent. App. __ (SMF ¶ 19; SMF Ex. 2 (M. Gartner Aff.). Parents often must produce a birth certificate to law enforcement agencies to report a lost child and secure the child's return, or to seek assistance in locating a kidnapped child. App. __ (SMF ¶ 23; SMF Ex. at 1 (H. Gartner Aff.)). If a family falls on hard times and applies for public aid, state agencies and employers often request birth certificates to enroll a child for needed benefits.[14] *Id.* If Heather's and

[14] Various programs offered to low-income Iowans and their children require verification of parentage. The Hawk-I Program for low-income children's health insurance is one example. Hawk-I Application, available at http://www.hawk-i.org/en_US/docs/Comm156%20for%20web%20view.pdf (last visited May 21, 2012). As another example, the Iowa Department of Human Services offers Child Care Assistance (CCA) to qualified parents. The application form requires the parents to list their names, relevant infor-

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Melissa's marriage were to break down, birth certificates commonly are necessary for a state agency to obtain delinquent child support, *see* Iowa Code 144.13(4), and Melissa and Mackenzie may be denied the full benefit of laws that determine custody and visitation. For example, the absence of an accurate birth certificate could facilitate an attempt by the parent on the birth certificate unilaterally to sever the other parent's relationship with their child contrary to the child's best interests. *See, e.g., In re C.B.L.*, 723 N.E.2d 316 (Ill. Ct. App. 1999) (lesbian denied standing to seek visitation with child she jointly planned and parented with former longtime partner, child's biological parent). If, tragically, both Heather and Mackenzie were to die, lack of an accurate birth certificate could complicate Melissa's ability to recover

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mation, and incomes. Iowa Department of Human Services, *Child Care Assistance Application*, available at http://www.dhs.state.ia.us/policyanalysis/PolicyManualPages/Manual_Documents/Forms/470-3624.pdf (last visited May 12, 2012). Lack of an accurate birth certificate could cause problems for families attempting to demonstrate eligibility for these programs.

Additionally, the state of Iowa requires surviving children of public safety officers to produce death and birth certificates proving parentage before they may receive public employee benefits. Officer Down Memorial Page, *Survivor Benefits in Iowa*, available at http://www.odmp.org/benefits/state/iowa (last visited May 21, 2012). Any child of a public safety officer must prove his or her parental relationship with the deceased before he or she is entitled to a parent's health insurance policy, accidental death benefits, pension benefits, or life insurance policy benefits. The child of a gay or lesbian parent not listed on the birth certificate could encounter substantial complications and needless frustration during a time when the child is grieving a parent's death.

Mackenzie's remains, make funeral arrangements, and file a wrongful death claim on Mackenzie's behalf.[15] *See* Iowa Code 144C.5; Iowa R. Civ. P. 1.206.

Further, absent Melissa's name, Mackenzie's birth certificate incorrectly labels her as an "illegitimate" child born out of wedlock, rendering her vulnerable to private bias and discrimination. *See* Iowa Admin. Code 641-96.6(4) (describing birth certificates that list only one parent's name as specifying that a child is "illegitimate," and imposing certain limitations on public access to certain such records in recognition that such children are often victims of discrimination); Iowa Code 600B.35; App.__(SMF Ex. 1 ¶ 24; SMF Ex. 9 (SMF Ex. 9 (County Vital Records Assessment) produced by Respondent in discovery, which directs county recorders to seal and/or purge

[15] In discovery, Respondent produced documents indicating that Melissa would encounter serious obstacles if she tried to obtain a copy of Mackenzie's birth certificate. *See* App.__(SMF ¶ 18; SMF Ex. 6 (Document titled Direct and Tangible Interest to a Certified Copy in Iowa with Application for a Search for an Iowa Record, permitting only the "[l]egal mother (named on the registrant's legal birth certificate)" and blood relatives to access a child's birth records, and appearing to deny Melissa access to Mackenzie's birth certificate; Melissa is not eligible to apply for a certified copy of Mackenzie's birth certificate because she is not listed as a parent on the birth certificate)). Melissa and Mackenzie are harmed by Melissa's inability to obtain Mackenzie's birth records for whatever purpose the family may need them.

certain documents relating to out-of-wedlock births prior to July 1, 1995, and/or that constitute evidence of legitimation).

As the District Court found, while Melissa and Heather could adopt Mackenzie and then seek a birth certificate from Respondent, an adoption proceeding would require significant expense and delay. App.__(Ruling at p. 3; SMF ¶ 25; SMF Ex. 1 (H. Gartner Aff.), SMF Ex. 2 (M. Gartner Aff.)); Linda S. Anderson, *Protecting Parent-Child Relationships: Determining Parental Rights of Same-Sex Parents Consistently Despite Varying Recognition of their Relationship*, 5 Pierce Law Review 1, 11 ("[C]ourt-determined methods [of establishing legal parentage], including step-parent adoption, require the passage of time and the interference of others to make the determination"). They also find it distressing that Melissa should have to go through the process of adopting her own child – the child she and Heather planned, prepared for, and sacrificed for together, before Mackenzie can obtain an accurate identity document. App.__(SMF ¶ 25; SMF Ex. at 1 (H. Gartner Aff.), SMF Ex. 2 (M. Gartner Aff.)).[16]

[16] As Melissa puts it, "It was a slap in the face when Mackenzie's birth certificate came. I just could not see how my name could be omitted like that. I worry that Mackenzie will grow up and feel that there are discrepancies between her and Zachary and my love for them, just because my name is not on her birth certificate." App. __(SMF Ex. 2 (M. Gartner Aff.)). Both Heather and Melissa feel the state has treated them as though they are not married at all. Heather states: "We were so excited [after our marriage] that

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D. Every other state that permits same-sex couples to marry, enter into civil unions, or enter comprehensive domestic partnerships, issues birth certificates to children of married same-sex couples on the same terms as to children of married different-sex couples.

Every other state with marriage, civil union, or comprehensive domestic partnership for same-sex couples applies the spousal presumption equally to all married couples, regardless of whether they are same-sex or different-sex.[17] State registrars in these states issue birth certificates upon birth to children of married lesbian couples listing both spouses. Respondent stands alone in denying birth certificates to children of married same-sex couples listing both spouses as parents.

Massachusetts enters both married same-sex parents' names on the birth certificate at birth. *Della Corte v. Ramirez*, 961 N.E.2d 601, 602-04 (Mass. Ct. App. 2012). *See also, e.g.*, Michael Levenson, *Birth Certificate*

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we could now fill out our application for the birth certificate using both of our names as parents for Mackenzie," but "Mackenzie is now being considered an illegitimate child, which she is not. She was born to a loving married couple." App.__(SMF Ex. 1 (Affidavit of Heather Martin Gartner)).

[17] *See, e.g.*, Linda S. Anderson, *Protecting Parent-Child Relationships: Determining Parental Rights of Same-Sex Parents Consistently Despite Varying Recognition of their Relationship*, 5 Pierce Law Review 1, 5 (2006) ("[U]nder state law in [Massachusetts, Vermont, Connecticut, and California], a child born to a member of the relationship, after the legal recognition of the relationship through a civil union ceremony, registration of a domestic partnership, or marriage ceremony, is a child of both the birth mother and her spouse").

Policy Draws Fire: Change Affects Same-Sex Couples, Boston Globe, July 22, 2005, at B1. The same is true in Vermont. *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951 (Vt. 2006) (non-biological mother is presumed parent of child born to her civil union partner). In Connecticut, both the official birth certificate worksheets previously used for births to a civil union couple, and the new worksheet for births to same-sex couples in marriages, civil unions, or designated out-of-state relationships, indicate that Connecticut presumes both partners to be parents at birth and enters both parents' names on birth certificates.[18] *See also, e.g., Freda v. Freda*, 476 A.2d 153, 155 (Conn. Super. Ct. 1984) (acknowledging that children born during marriage are presumed to be legitimate).

California, too, extends the marital presumption equally to same-sex spouses or domestic partners. *See* California Family Statute 297.5(d) ("The rights and obligations of registered domestic partners with respect to a child of either of them shall be the same as those of spouses"); *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal., 2005).

New York State and New York City (which have separate processes) enter both married lesbian parents' names on birth certificates.[19] *See Debra*

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[18] *See* copies of these forms at App.__(Petition Ex. A).

[19] *See Married Lesbians To Be Listed As Parents on City Birth Certificates*, NY1 News, Mar. 25, 2009, available at

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H. v. Janice R., 930 N.E.2d 184 (N.Y. 2010) (non-biological lesbian co-parent was legal parent of child as result of spousal presumption of parentage that attached to women's Vermont civil union).

New Jersey law also mandates that the birth certificate of a child born to a couple in an out-of-state marriage or civil union identify both civil union partners as parents because of the spousal presumption (N.J. Stat. Ann. 37:1-31(3); N.J. Stat. Ann. 9:17-43; N.J. Stat. Ann. 9:17-44); *In re Parentage of Robinson***,** 383 N.J.Super. 165, 890 A.2d 1036 (2005); Two Moms to Be on Baby's Birth Certificate After N.J. Gay Rights Ruling, Fox News Nov. 15, 2006, available at http://www.foxnews.com/story/0,2933,229738,00.html (last visited May 21, 2012) (court decision that required issuance of civil union licenses to same-sex couples also required that both lesbian mothers in a civil union go on a child's birth certificate)

The same is true in the District of Columbia, Illinois, Maryland, Washington, and Nevada. *See* D.C. Code 16-909(a-1)(2), 16-907(c); 750 ILCS 45/5; 410 ILCS 535/12, 750 ILCS 5/212, 750 ILCS 5/303, 750 ILCS 40/2, 750 ILCS 40/3; Nev. Rev. Stat. 126.051(1), 126.061(1); http://www.dshs.wa.gov/pdf/publications/22-586.pdf (child born to regis-

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http://www.ny1.com/content/top_stories/96264/married-lesbians-to-be-listed-as-parents-on-city-birth-certificates/ (last visited May 21, 2012).

tered domestic partners in Washington is presumed child of both partners); Opinion of Maryland Attorney General (Feb. 2010) (marriages of same-sex couples from other jurisdictions will be respected in Maryland); Letter from Maryland Registrar to local birth registrars instructing them to place both same-sex spouses' names on a child's birth certificate as parents in reliance on the spousal presumption of parentage (Feb. 10, 2011), available at http://data.lambdalegal.org/in-court/downloads/exec_md_20110210_ss-spouse-instructions-to-facilities.pdf (last visited May 21, 2012).

II. To interpret Iowa's birth certificate law as permitting denial of a two-parent birth certificate and the spousal presumption of parentage to Mackenzie would render it unconstitutional.

The District Court's construction of Iowa Code 144.13(2) is necessary to uphold the statute's constitutionality. "If [a] law is reasonably open to two constructions, one that renders it unconstitutional and one that does not, the court must adopt the interpretation that upholds the law's constitutionality." *Iowa Supreme Court Bd. of Professional Ethics and Conduct v. Visser,* 629 N.W.2d 376 (Iowa 2001), citing 2A Norman J. Singer, Statutes and Statutory Construction § 45.11, at 70-71 (2000 rev.). If interpreted as Respondent advocates, the birth certificate law would be unconstitutional both on its face and as applied, *see* Iowa Code 17A.19(10)(a).

A. Denial of a two-parent birth certificate to Mackenzie would deprive the Petitioners of equal protection of the law.

Iowa's Constitution contains two central guarantees of equality. The Inalienable Rights Clause, Article I, § 1, provides: "All men and women are, by nature, free and equal, and have certain inalienable rights – among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness." The Equal Protection Clause, Article I, § 6 of the Iowa Constitution, provides: "All laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen, or class of citizens, privileges and immunities, which, upon the same terms shall not equally belong to all citizens."

Denial of a two-parent birth certificate to Mackenzie solely on the ground that she was born to a married same-sex couple rather than a different-sex couple would single her out for unfavorable treatment based on the sex, sexual orientation, and status of her parents, and the circumstances of her conception and birth, and would treat Melissa and Heather adversely based on their sex and sexual orientation.

i. Petitioners are similarly situated to families whose children receive a birth certificate naming both spouses in reliance on the spousal presumption of parentage.

Heather and Melissa are similarly situated to different-sex spouses

who give birth to children who have a biological connection solely to one spouse, but who nevertheless receive a birth certificate naming both spouses under Iowa Code 144.13(2). Melissa's and Heather's use of reproductive technology to conceive is common to many families with different-sex married parents. *See, e.g., In re Marriage of Witten*, 672 N.W.2d 768, 781-82 (Iowa 2003). Respondent enters the husband in such families as the father on a birth certificate without "additional inquiry, paternity testing, or court or administrative intervention." App.__(Respondent's Answer to Interrogatory, No. 13)).

Petitioners are in at least as much need of an accurate birth certificate for Mackenzie as are such families. Heather's and Melissa's economic, legal, and practical needs in caring for Mackenzie are indistinguishable from those of different-sex spouses with children. Mackenzie has the same need for emotional, legal, and economic security, and for social acceptance and legitimacy, as do children born to different-sex spouses who lack a biological connection to both parents. She is as likely to benefit from the removal of the possibility of stigma relating to the circumstances of her birth as are other children issued birth certificates identifying both different-sex spouses as parents despite the absence of a genetic connection.

ii. As interpreted by Respondent, Iowa Code 144.13(2) classifies parents with respect to their sex and sexual orientation, and classifies children with respect to the status and conduct of their parents.

Respondent admits that its interpretation of Iowa Code 144.13(2) as permitting Respondent to refuse to list both same-sex spouses on a birth certificate of a child born during the marriage classifies persons on the basis of sex. App. __(Respondent's Reply to Request for Admissions No. 6). A parent receives the benefit of the spousal presumption based upon his sex: a male spouse to a woman giving birth is a presumed parent, but a female spouse is not. *See M.R.M., Inc. v. City of Davenport,* 290 N.W.2d 338, 340-41 (Iowa 1980) (regulation "prohibiting any person from administering a massage to a person of the opposite sex obviously [is] a classification based on sex and potentially suspect").

As interpreted by Respondent, the law also classifies persons based on sexual orientation; it denies lesbian and gay spouses the parental presumption, but grants it to non-gay spouses. Although Respondent no longer appears to dispute this point, Respondent did so below, arguing that a gay man could marry a woman and receive the benefit of the presumption for any resulting children, and that a lesbian similarly could marry a man. App.__(Respondent's Reply to Request for Admissions No. 7). The Iowa Supreme Court disposed of this defective analysis in *Varnum.* There, the de-

fendant made an identical claim, arguing that Iowa's marriage ban, which did not mention gay or lesbian people or sexual orientation on its face but simply defined marriage as exclusively between a man and a woman, did not classify persons based on sexual orientation because gay men could marry women, and lesbians could marry men. The Court held:

> It is true the marriage statute does not expressly prohibit gay and lesbian persons from marrying; it does, however, require that if they marry, it must be to someone of the opposite sex. Viewed in the complete context of marriage, including intimacy, civil marriage with a person of the opposite sex is as unappealing to a gay or lesbian person as civil marriage with a person of the same sex is to a heterosexual. Thus, the right of a gay or lesbian person under the marriage statute to enter into a civil marriage only with a person of the opposite sex is no right at all. Under such a law, gay or lesbian individuals cannot simultaneously fulfill their deeply felt need for a committed personal relationship, as influenced by their sexual orientation, and gain the civil status and attendant benefits granted by the statute. Instead, a gay or lesbian person can only gain the same rights under the statute as a heterosexual person by negating the very trait that defines gay and lesbian people as a class – their sexual orientation.

Varnum, 763 N.W.2d at 885. The Court concluded that "[t]he benefit denied by the marriage statute – the status of civil marriage for same-sex couples – is so 'closely correlated with being homosexual'" that the law "differentiate[d] implicitly on the basis of sexual orientation." *Id*; *see, also*, *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez*, 130 S.Ct. 2971, 2990 (2010) (singling out people for differential treatment based on whether they engage in intimate conduct with someone of the same sex constitutes classification based on sexual orienta-

tion because targeting "homosexual conduct" "is an invitation to subject homosexual *persons* to discrimination") (quoting *Lawrence v. Texas,* 539 U.S. 558, 575 (2003) (italics in original)). As Justice O'Connor explained in her concurrence in *Lawrence,* "[w]hile it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the] law is targeted at more than conduct. It is instead directed toward gay persons as a class." 539 U.S. at 583.

The birth certificate law, as interpreted by Respondent, also classifies children based on who their parents are. Children born to different-sex spouses are entitled to birth certificates listing both their parents. Those born to same-sex spouses are not, putting a significant obstacle in the way of their emotional, physical, and financial security. As Iowa and federal courts have recognized, children are not responsible for the identity, status, or conduct of their parents, or for how they arrived into this world. It is "illogical and unjust" to penalize children for the circumstances of their birth by denying them important rights and protections. *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175, 176 (1972).

iii. As interpreted by Respondent, Iowa Code 144.13(2) is subject to and fails heightened scrutiny.

State laws or policies that classify persons based on their sexual orientation or sex, or that distinguish between children based on their parents' status or conduct, must be viewed with suspicion and subjected to at least heightened scrutiny. *See Varnum,*763 N.W.2d at 896 ("[L]egislative classifications based on sexual orientation must be examined under a heightened level of scrutiny under the Iowa Constitution;" expressly leaving open the possibility that classifications based on sexual orientation are subject to strict scrutiny); *Sanchez v. State,* 692 N.W.2d 812, 817 (Iowa 2005) (sex-based classifications subject to at least heightened scrutiny);[20] *Rake v. Ohden,* 346

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[20] In light of the 1998 amendment altering Article I § 1 to read: "All men ***and women*** are by nature free and equal" (emphasis added), strict scrutiny for sex-based classifications would be most appropriate. This clause has an interpretive influence on the Constitution as a whole, and Iowa courts have not considered whether this amendment warrants a change in the level of scrutiny applicable to sex-based classifications. The Iowa Supreme Court construes the Iowa Constitution and its amendments under the same rules applied to statutes. *Rants v. Vilsack,* 684 N.W.2d 193, 199 (Iowa 2004). A constitutional amendment is presumed to effect a change in the law. *State v. Snyder,* 634 N.W.2d 613, 615 (Iowa 2001); *In re Estate of Thomann,* 649 N.W.2d 1, 4 (Iowa 2002) (each addition is presumed made for a reason, and not redundant or irrelevant). The vast majority of states with equal rights amendments use a more rigorous standard of review for sex-based classifications than intermediate scrutiny. *See, e.g., Sail'er Inn, Inc. v. Kirby,* 485 P.2d 529, 533 (Cal. 1971); *Daly v. DelPonte,* 624 A.2d 876, 883 (Conn. 1993); *People v. Ellis,* 311 N.E.2d 98 (Ill. 1974); *Tyler v. State,* 623 A.2d 648, 651 (Md. 1993); *Commonwealth v. King,* 372 N.E.2d 196, 206 (1977); *In re McLean,* 725 S.W.2d 696, 698 (Tex. 1987). Both the Iowa Constitu-

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N.W.2d 826, 829 (Iowa 1984) (laws and policies classifying children based on the status or conduct of their parents must be at least substantially related to a legitimate government interest). As this Court has explained, classifications based on sex, or based on the status or conduct of a child's parents, "are so seldom relevant to achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy." *Varnum*, 763 N.W.2d at 886 (quotations omitted), citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). "Rather than bearing some relationship to the burdened class's ability to contribute to society, such classifications often reflect irrelevant stereotypes." *Id.* Further, as described more fully below, Respondent's interpretation of the birth certificate law classifies persons in a manner that infringes unequally on a fundamental liberty interest, requiring strict scrutiny.

Respondent cannot meet its burden to overcome the presumption of unconstitutionality that attaches for a classification based on sex, sexual orientation, or parental status or conduct, or for discrimination with respect to a fundamental liberty interest. Denial of a two-parent birth certificate to a child born to same-sex spouses does not serve even a legitimate purpose, let

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tion's express guarantee of equality to each man and woman and increasing societal and judicial recognition of the invidious nature of sex-based classifications justify application of strict scrutiny to such classifications.

alone a substantially important or compelling one; nor does it serve such interests in an adequately tailored manner. Iowa Code 17A.19(10)(a).

Respondent has identified the following hypothetical state interests, but none of these interests in fact are served by denying a two-parent birth certificate to a child born to same-sex spouses. First, Respondent argues that naming Melissa as Mackenzie's parent defeats its interest in "obtaining accurate medical and biographical information from a child's biological mother and father to utilize for public health programs and research." Respondent's Brief at 31-32. Respondent suggests that statistical information about paternal race, for example, would be compromised. *See* Respondent's Brief at p. 34; App. __(Respondent's Answer to Interrogatory No. 13)). However, nothing prevents Respondent from collecting data about genetic parentage for internal and research purposes independent of the process for issuing birth certificates accurately reflecting *legal* parentage. If Respondent's argument had merit, then birth certificates reflecting solely a child's adoptive parents, and birth certificates for children of different-sex spouses with the use of gamete donation similarly would defeat their interest in data collection for research. Clearly, this is not the case.

Moreover, Iowa law – both statutory and decisional – long has made clear that any such interest in "aggregate statistical information" gathering, as Respondent puts it, is subordinate to the interests promoted by the spousal

presumption and the needs of children and their parents for accurate identity documents reflecting legal relationships, as Iowa Code 144.13(2) makes clear on its face. *See* Point IB, above. Consequently, researchers or policy makers who use birth certificates to reach policy conclusions already must make allowances for the fact that some children are conceived through reproductive technology or as a result of intercourse with non-marital partners, and therefore may not have a genetic connection to one or both parents listed on the birth certificate.

Respondent also posits that denying two-parent birth certificates to children of same-sex spouses furthers the governmental interest of "maintaining accurate records of the parentage of children for vital statistics records." Respondent's Brief at 32. However, because a birth certificate documents legal parentage, and not genetic parentage, and is a universal requirement for families to access vital protections and benefits, to omit Melissa's name would render Mackenzie's birth record *inaccurate*. *Raftopol*, 12 A.3d at 789 ("A person who is named on a birth certificate as a parent to the child is so named on the certificate as a function of the department's responsibility to keep accurate records of vital records. The birth certificate must accurately reflect the *legal* relationship between parent and child. . . .") (emphasis added). Indeed, the District Court found that "the parties agree

that a birth certificate is the primary way to demonstrate legal parentage." App. __ (Ruling at p. 2).

In a particularly Orwellian argument, Respondent next claims that issuance of two-parent birth certificates to children born to same-sex spouses "thwarts" the "integrity and stability" of these families because the family could experience discrimination in other states if they attempt to rely on the birth certificate outside of Iowa. Respondent's Brief at 44. In essence, Respondent would make Mackenzie and other children vulnerable in their home state out of a concern that they will experience similar disrespect elsewhere. That discrimination exists in states outside of Iowa is no reason for Iowa to bend its statutes and cramp its constitutional guarantee of equality to meet other states' discriminatory constraints. *Varnum,* 763 N.W.2d 862.

Further, even when same-sex spouses perform adoptions to assure an additional layer of protection for their parent-child relationships in case they travel out of state, they are not safe from harm in Iowa absent the spousal presumption. Adoptions take time, and while they are pending, the family is at risk. For example, if a couple does not have the benefit of the spousal presumption of parentage, the non-biological parent may not be able to make medical decisions if the birth mother is incapacitated during childbirth, and the child needs care. Additionally, some families may not have access to lawyers or to the resources necessary to adopt, which is an expensive and

intrusive process. App. __ (Ruling at p. 3). Finally, it is discriminatory to require a lesbian non-biological parent to adopt her own child – the child she jointly planned and saved for and achieved with her spouse using reproductive technology -- when a different-sex spouse using the same technology need not.

Respondent also argues that its denial of a two-parent birth certificate to children born to same-sex spouses protects these families from a future paternity challenge. Respondent incorrectly asserts that if lesbian spouses who are not genetically related to their children challenge their own parentage in order to avoid child support obligations, or putative genetic fathers make paternity claims, "100%" of these challenges would be successful in dis-establishing the parentage of a non-biological lesbian spouse. Respondent's Brief at p. 50.

Again, Respondent misstates Iowa law. As *Huisman,* 644 N.W.2d at 326, and *In re Marriage of Gallagher,* 539 N.W.2d 479 (Iowa 1995), make clear, estoppel and waiver principles bar a putative genetic father from challenging the parentage of a child born to a married couple – despite test results showing the putative father's genetic relationship to a near certainty -- if the putative father has not established a parental relationship with a child. These principles also prevent a spouse in these circumstances from dis-establishing parentage based solely on genetics. *See also, Debra H.,* 930

N.E.2d 184 (in custody dispute in which biological mother argued that her former partner was not a parent because she had no genetic connection to their child, New York high court held that non-biological lesbian co-parent was legal parent of child as a result of spousal presumption of parentage that attached to their Vermont civil union, and permitted her to seek custody and visitation); *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951 (Vt. 2006).

Respondent asserts that its interpretation protects lesbian spouses from being designated as parents without their express consent. Respondent's Brief at p. 50. However, the wishes and pre-birth intentions of a mother's spouse are not relevant to whether she is a parent under Iowa law; she is a parent "by operation of law." *Steinke, supra*, 801 N.W.2d 34; *see* Point IA, above. A husband's responsibility for a child of the marriage has never turned on whether the husband consented to his wife's pregnancy or even whether he has engaged in marital sex. There is no justification for a different rule for married same-sex couples.[21] *See* Points IA,B above; *see also*

[21] Citing an article by Maggie Gallagher, an activist who opposes the freedom to marry for same-sex couples, Respondent argues that different-sex couples "are presumed to consent to co-parenting by having marital sex," and that same-sex couples cannot demonstrate their consent to co-parent in this way, as their sexual intimacy cannot lead to procreation. *See* App.__ (Respondent's Answers to Interrogatory No. 13). This is a misstatement of Iowa law. Historically, husbands always received the benefit of the spousal presumption, and have been entitled to birth certificates accordingly, regardless of their fertility, their wives' fertility, whether they ever have engaged in

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Appleton, 86 Boston Univ. L. Rev. at 233 ("the presumption of legitimacy instantly designates a man as a child's legal father *at the time of birth*," and "no particular behavior on his part is necessary") (emphasis in original).

In the court below, Respondent also argued that applying the presumption of parentage to lesbian spouses would deprive a biological father of parental rights "with no legal notice or opportunity to be heard," which could impinge upon "a biological father's fundamental rights to parent." App. __ (Respondent's Answer to Interrogatory No. 13)). Again, Respondent misstates Iowa law, which long has established a mechanism for putative fathers to seek parental rights with respect to children born to any married couple, and which adequately protects the putative father's liberty interests regardless of the sex or sexual orientation of the spouse/presumed parent. *See Huisman,* 644 N.W.2d at 324-25 (detailing the process for such a paternity claim); Point IA, above.

In short, Respondent cannot demonstrate even a rational relationship, let alone a substantial or narrowly tailored one, between any of the state interests it cites and its denial of birth certificates to children of same-sex spouses identifying both spouses as parents. Indeed, there is not even a legitimate state interest served by forcing children to seek alternative ways to

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marital sex, or even whether they have been abroad and deprived of any contact with their spouses for the preceding year. *See* Points IA,B.

prove who their legal parents are. Respondent's construction of Iowa Code 144.13(2) creates a subclass of children who are treated differently under law solely because of the sex and sexual orientation of their parents. In addition to inflicting serious tangible harms on these children, this selective denial also marks these children as less worthy of recognition and protection than children in other families, thereby stigmatizing them and their families and inviting further discrimination against them. Accordingly, Iowa Code 144.13(2), as construed by Respondent, would violate the equality guarantees of the Iowa Constitution, Article I, §§ 1 and 6.

iv. Respondent's expressed justifications for denying Petitioners an accurate birth certificate reflect illegitimate purposes and therefore fail under any standard of review.

As interpreted by Respondent, Iowa Code 144.13(2) discriminates on its face against all Petitioners. Discrimination also is evident in Respondent's action in denying Mackenzie and other children of same-sex spouses two-parent birth certificates. Consequently, with discriminatory treatment obvious on its face and as applied, there is no need to search for discriminatory purpose. Nevertheless, it is worth noting that Respondent has both implicitly and explicitly expressed improper purposes.

Under all standards of review, a law or policy is unconstitutional if it serves an illegitimate purpose. At the very least, in the presence of an illegi-

timate purpose, courts reduce deference given to other facially legitimate grounds for a classification, and examine whether they are pretexts for discrimination. *See, e.g., Cleburne,* 473 U.S. at 471-72. Illegitimate purposes include animus against, negative attitudes toward, or fear of a group of people, *Romer v. Evans,* 517 U.S. 620, 634 (1996); *Cleburne*, 473 U.S. at 448; moral disapproval of a group, *Lawrence v. Texas*, 539 U.S. 558, 582 (2003); a purpose to disadvantage one group, or to make one group unequal to everyone else, *Racing Ass'n of Central Iowa v. Fitzgerald*, 675 N.W.2d 1, 15 (Iowa 2004) ("RACI"); *Romer,* 517 U.S. at 634; or a bare desire to harm a politically unpopular group, *U.S. Dept. of Agric. v. Moreno,* 413 U.S. 528, 534 (1973).

Improper purposes (whether express or implied) evident in the justifications cited by Respondent for the denial of an accurate birth certificate include:

1) Preferring biological parent-child relationships over other legal parent-child relationships, and preferring traditional family structures over non-traditional family structures.[22] Respondent's preference for bio-

[22] Respondent's purpose of preferring biological relationships over other legal parent-child relationships is evidenced in the following contentions, among others: 1) Respondent's references to birth records that document non-biological parentage uniformly as "inaccurate," regardless of whether they are consistent with legal parent-child relationships. App.__(Respon-

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logical relationships over other legal parent-child relationships "stigmatizes adoption as second best," *see* Appleton, *supra,* 86 Boston Univ. L. Rev. at 229 n. 11, as well as stigmatizing other children who are not genetically related to their parents, whether because they were conceived through reproductive technology or intercourse with a non-marital partner. Iowa and federal law reject differential treatment of children based on whether their legal parent-child relationships are grounded in biology, *see Smith v. Org. of Foster Families for Equality and Reform*, 431 U.S. 816, 845 n. 51 (1977) (Stewart, J., concurring); Iowa Code 633.223 (1963); *In re Adoption of A.J.H.*, 519 N.W.2d 90, 92 (Iowa 1994). Iowa law also rejects cramped notions of family that derive solely from biological relationships. *See* Points IA,B, above; Point IIB, below.

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dent's Answers to Interrogatory No. 13)); 2) Respondent's statements that "[t]he system for registration of live births in Iowa has since its inception recognized the biological and 'gendered' roles of 'mother' and 'father,' grounded in the biological "facts of birth"– that a child has one biological mother and one biological father– and providing a mechanism for the recording of that information," and that denying Mackenzie a corrected birth certificate constituted a recognition of the "biological reality that women and men each play a distinct but equally necessary role in human reproduction and have corresponding rights and duties". Respondent's Brief at pp. 12, 36.

2) Promoting sex-stereotypes.[23] Respondent argues that its denial of a corrected birth certificate is justified because the spousal presumption should apply differently to female spouses based on "real differences" between men and women concerning how they give birth, and the need to recognize "gendered roles" for parents. App.__(Exhibit 1 attached to Answer by Respondent Iowa Department of Public Health, filed March 9, 2011 (Letter from IDPH dated March 17, 2010)). However, Iowa law does not permit stereotypical assumptions that men and women play different parenting roles based on their gender. Sex stereotypes are a form of unlawful sex discrimination under state and federal law. *See, e.g., Hansen,* 733 N.W.2d at 693, 700; *U.S. v. Virginia,* 518 U.S. 515 (1996) (rejecting stereotypical assumptions that women cannot handle a strict military-like school environment); *Miss. Univ. for Women v. Hogan,* 458 U.S. 718 (1982) (that men are not suited for the nursing profession); *Califano v. Westcott,* 433 U.S. 76 (1976) (that children are entitled to social security benefits only when fathers but

[23] This illegitimate purpose is evident in Respondent's contentions that the system for registering birth records should recognize "the biological and 'gendered' roles of 'mother' and 'father,'" and that Iowa birth record statutes "expressly recognize the biological reality that women and men each play a distinct but equally necessary role in human reproduction and have corresponding rights, duties, and obligations to their child." *See* App.__(Exhibit 1 attached to Answer by Respondent Iowa Department of Public Health, filed March 9, 2011 (Letter from IDPH dated March 17, 2010)).

not mothers are unemployed); *see, also,* Point IA, above. Respondent gives no explanation for why Heather's and Melissa's use of reproductive technology to conceive is any different from the use of such technology by a different-sex couple, to whom Respondent admittedly would issue a two-parent birth certificate.

3) Privileging putative fathers of children born to married same-sex couples over putative fathers of children born to married different-sex couples.[24] Respondent contends that a putative genetic father who has impregnated a married lesbian should not have to overcome the obstacle of the spousal presumption in order to seek custody or visitation. Yet a putative genetic father who has impregnated a woman married to a man *is* subject to both the presumption and the related requirement that he has seized the opportunity to create a parent-child bond with the child. *See Huisman,* 644 N.W.2d 321. Respondent offers no explanation for why a putative father should be treated differently based on the sexual orientation of the woman he impregnates or the sex of her spouse.

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[24] Both in Respondent's letter denying Mackenzie a corrected birth certificate, and in discovery, Respondent repeatedly expressed concern that applying the spousal presumption to a lesbian spouse would deprive a "biological father" of his "fundamental rights to parent" "with no legal notice or opportunity to be heard." App.__(Respondent's Answers to Interrogatory No. 13).

4) Preferring sexual intercourse as a method for having children over the use of reproductive technology. Privileging certain couples because of how they conceive their children is impermissible under Iowa law, as it impinges upon the most intimate realms of family and procreative decision-making. *Witten*, 672 N.W.2d at 781-82 (Iowa's "judicial decisions and statutes . . . reflect respect for the right of individuals to make family and reproductive decisions based on their current views and values").

In sum, Respondent's action in denying Mackenzie a birth certificate is unconstitutional because of the presence of all of these impermissible purposes. *RACI*, 675 N.W.2d at 15.

B. Respondent's interpretation of Iowa Code 144.13(2) also violates the due process guarantee.

Iowa's Due Process Clause, Article I, § 9 of the Iowa Constitution, provides that "no person shall be deprived of life, liberty, or property, without due process of law." Among the personal interests protected by the Iowa Constitution's due process clause are the right to privacy (which includes the fundamental rights to family integrity and association), and the rights of parents to autonomy with respect to procreative decision-making and other intimate choices of a deeply personal nature, and to the custody, care, and control of their children.

i. Respondent's denial of an accurate birth certificate infringes on Heather's and Melissa's fundamental rights of parental autonomy, and all Petitioners' rights to family integrity and association.

The due process clause exists to protect nonconforming choices in creating family or entering into intimate relationships. *Callender*, 591 N.W.2d at 191 ("'liberty' must include the freedom not to conform"). In Iowa, family rights and ties are not diminished by arising outside the majority norm. "[T]he traditional makeup of the family" has "changed in recent generations," but "[t]he nontraditional circumstances in which parental rights arise do not diminish the traditional parental rights at stake." *Id.* at 191; *see, also*, *Hansen*, 733 N.W.2d at 693, 700. All Iowans have the same birthright to liberty regardless of whether they were born into families that have not traditionally been embraced, *see Callender*, 591 N.W.2d at 190, or have chosen to create families in nontraditional ways, *see Witten*, *supra*, 672 N.W.2d at 781-82. Both parents and children have protected liberty interests in maintaining family integrity. *Callender*, 591 N.W.2d at190 (state has an interest in protecting the marital family); *In re A.M.H.*, 516 N.W.2d 867, 870 (Iowa 1994) (recognizing that parent has liberty interest in maintaining family integrity). "The right of a parent to companionship, care, custody, and management of his or her children has been recognized as 'far more precious … than property rights …,' and more significant and priceless than 'liberties

which derive merely from shifting economic arrangements.'" *Callender*, 591 N.W.2d at 190, citing *A.M.H.*, 516 N.W.2d at 870 (citations omitted).

Parents may not be afforded fewer rights or lesser parental autonomy based on their gender or sexual orientation. *Varnum*, 763 N.W.2d at 901 n. 27. *Callender*, 591 N.W.2d at 190. Accordingly, the State may not erect hurdles for gay or lesbian parents that do not exist for other parents, such as a requirement that only those married parents who are of the same-sex must undertake expensive and intrusive adoption proceedings before they can obtain accurate birth certificates. *See Varnum*, 763 N.W.2d at 901 n. 27 (any effort by government to deter gay and lesbian couples from having children "would raise serious due process concerns"), citing *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

It also is impermissible to penalize a child or her parents because the child was conceived through the use of reproductive technology. This Court has likened the use of such technology to other forms of procreative decision-making: "Like decisions about marriage or relinquishing a child for adoption, decisions about the use of one's reproductive capacity have lifelong consequences for a person's identity and sense of self." *Witten*, 672 N.W.2d at 781-82 (stating that Iowa's "judicial decisions and statutes . . . reflect respect for the right of individuals to make family and reproductive decisions based on their current views and values").

Thus, Petitioners have a fundamental liberty interest in their family privacy, integrity, and association, including the fundamental right to security in their legal parent-child bonds. To withhold from this family means of demonstrating Mackenzie's identity and Melissa's parental authority to her care and custody, would unconstitutionally infringe on these liberty interests, depriving the family of the single most important identity document necessary for Mackenzie's parents to demonstrate their relationship to her, and to protect her in myriad circumstances.

ii. Respondent's action fails strict scrutiny and offends human dignity.

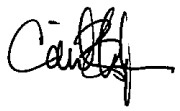
A law or policy infringing a fundamental right has no presumption of constitutionality and is subject to strict scrutiny. *In re S.A.J.B.*, 679 N.W.2d 645, 649 (Iowa 2004). The government bears the burden to prove that the infringement is "narrowly tailored to serve a compelling state interest." *In re Detention of Williams,* 628 N.W.2d 447, 452 (Iowa 2001). Here, Respondent cannot meet that burden for the reasons described above in Point IIAiii, above. Further, to deprive Mackenzie of an accurate identity document, rendering her and her relationship with one of her mothers insecure, "shocks the conscience or otherwise offends judicial concepts of fairness and human dignity." *In re K.M.,* 653 N.W.2d 602, 607 (Iowa 2002).

CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, the judgment of the district court ordering a birth certificate issued to Mackenzie listing both Heather and Melissa as her parents should be ***affirmed***.

REQUEST FOR ORAL ARGUMENT

Petitioners hereby request oral argument.



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This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 13,746 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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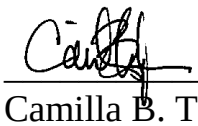

Camilla B. Taylor May 21, 2012

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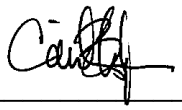

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The undersigned hereby certify that two copies of the foregoing brief was served on each of the parties of record by enclosing the same in an envelope addressed to each such party listed below at his address as disclosed by the pleadings of record with postage fully paid and by depositing said envelope in a U.S. Post Office depository in Chicago, Illinois, May 21, 2012.

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