IN THE IOWA DISTRICT COURT
FOR POLK COUNTY

JESSICA MARIE BUNTEMEYER and JENNIFER LEE BUNTEMEYER, Petitioners, v. IOWA DEPARTMENT OF PUBLIC HEALTH, Respondent.	)	CASE NO. CV 9041

PETITIONERS' MEMORANDUM IN SUPPORT OF DECLARATORY AND INJUNCTIVE RELIEF ON JUDICIAL REVIEW

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STATEMENT OF THE CASE

Petitioners are a married lesbian couple, Jessica Marie ("Jessica") and Jennifer Lee ("Jennifer") Buntemeyer (collectively, "Petitioners"), who have been in a loving, committed relationship since 2008. *See* Affidavit of Jennifer Lee Buntemeyer ("Jennifer Aff."), attached to Appendix as Ex. 4 at ¶ 5. Jennifer and Jessica seek an accurate fetal death certificate for their stillborn baby, Brayden Bruce Buntemeyer ("Brayden"), listing both of them as parents.

Jennifer and Jessica met and fell in love while serving in the United States Army in Iraq. *Id.* at ¶5. Currently, Jessica is a student, and Jennifer works for the federal government. *Id.* They reside in Davenport, and both continue to serve in the United States Army Reserves. *Id.* at ¶¶4-5. Jennifer has been deployed twice to Iraq. *Id.* at ¶5.

Jessica and Jennifer married in Iowa on October 8, 2010. *Id.* at ¶6; *see, also,* Appendix at Ex. 1 (marriage certificate). They decided together to have a child. Jennifer Aff. at 7. Because both women wished to share a biological connection with their child, they chose a form of reproductive technology that would make that possible. Affidavit of Jessica Aiken Buntemeyer ("Jessica Aff."), attached to Appendix as Ex. 5 at ¶4. Jessica became pregnant via in vitro fertilization using an ovum provided by Jennifer and sperm from an anonymous donor. *Id.* Jessica and Jennifer were thrilled. Jennifer Aff. at ¶7. Their families were, too. *Id.* at ¶9. Jennifer's father was particularly excited, as his name is Bruce, and Brayden Bruce would be his namesake. *Id.* at ¶9.

On Wednesday, October 19, 2011, halfway through Jessica's seventh month of pregnancy, Jessica and Jennifer went to a medical appointment for a routine check-up. Jessica Aff.at ¶5. A nurse detected a fetal heartbeat during this visit. *Id.* The following morning, on October 20, 2011, Jessica became concerned that she had stopped feeling fetal movement. *Id.* at

¶6. She and Jennifer together returned to the doctor's office. *Id.* This time, a nurse detected no heartbeat. *Id.*

In a state of devastation, Jessica and Jennifer checked in at Genesis Medical Center in Davenport, Iowa, for induction of labor. *Id.* at ¶8. After more than a day of difficult labor, on October 21, 2011 at 5:04 p.m., Jessica gave birth to Brayden at 30 weeks' gestation. Jennifer Aff. at ¶ 11. He had died *in utero* prior to labor because his umbilical cord had become wound around his neck. *Id.*; *see, also,* Appendix at Ex. 2 (Certificate of Fetal Death Worksheet). Jessica and Jennifer and their family members were able to spend approximately six hours with Brayden that day, crying and holding him, and saying their final goodbyes. Jennifer Aff. at ¶11. They held a memorial service for Brayden on October 29, 2011. *Id.* at ¶14. For the memorial service, Jennifer and Jessica worked with Jessica's sister to collect photographs and prepared a 6-minute video tribute to Brayden to celebrate their love for him. Jennifer Aff. at ¶ 14; *see also id.* at Ex. 4A (disc containing video shown at Brayden's service), Ex. 4B (photographs).

On the fetal death certificate worksheet, Jessica filled out the boxes for "mother" and Jennifer filled out the boxes marked "father" because there was no other place on the form to indicate her parentage. Jessica Aff. at ¶9; Ex. 2 (Certificate of Fetal Death Worksheet). They indicated on the form that Jessica is married. *Id*.

Jessica and Jennifer requested a copy of Brayden's fetal death certificate so that they would have an official record of his existence. Jennifer Aff. at ¶15. They wanted to place his death certificate in a box of precious things that they created to memorialize his life. *Id.*

On January 12, 2012, Respondent Iowa Department of Public Health ("Department") issued Jennifer and Jessica a fetal death certificate for Brayden that omitted Jennifer's name. The death certificate consisted of a reproduced image of the form that the women had filled out

in their own handwriting, transferred onto an official form, on which someone had erased or whited out Jennifer's handwritten name and identifying information. *See* Appendix at Ex. 3 (Certificate of Fetal Death); Ex. 7 (Respondent's Response to Request for Admission No. 6, acknowledging that The Department "erased, corrected, altered, questioned, deleted, whited out, or otherwise amended information on the form titled 'Certificate of Fetal Death' filled out by Petitioners before issuing the fetal death certificate for Brayden Bruce Buntemeyer").

Jennifer and Jessica were stunned to see the death certificate, and experienced fresh heartbreak as a result. Jessica Aff. at ¶10. As Jessica put it, "[T]he name [the Department] scratched out and deleted meant [the Department was] deleting a mother from her child's only legal proof of existence." *Id.* at ¶13. "An accurate death certificate for Brayden is essential so that we can get closure and validation that we are both the parents of our beloved Brayden Bruce." *Id.* at ¶15. Jennifer states, "In erasing me from Brayden's death certificate, [the Department] sent the message to Jessica and me that the State of Iowa does not view me as Brayden's parent." Jennifer Aff. at ¶19.

Jennifer repeatedly called and left messages with staff at the Department's Des Moines office on January 17, 18, 19, and 20, asking for an explanation. Jennifer Aff. ¶21. No one returned her call. *Id.*

Pursuant to Iowa Code 17A.19, Jennifer and Jessica filed their Petition for Judicial Review of Respondent Agency's Failure To Issue an Accurate Fetal Death Certificate for Brayden Bruce Buntemeyer on February 28, 2012. As explained further below, the Department's act in erasing Jennifer's name from Brayden's death certificate is "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)), because the Department

consistently has issued fetal death certificates naming both spouses as the stillborn child's parents "without any additional inquiry, paternity testing, or investigation." Appendix at Ex. 7 (Department's Response to Petitioners' Request for Admission No. 1; Ex. 6 (Department's Answer to Interrogatories No. 3 (acknowledging that the Department "generally . . . register(s) the name of a mother's husband as the father of the child on a fetal death certificate"), No. 11). The Department departed from this practice here without fair or rational basis.

Further, the Department's act is "in violation of" Iowa statutory and decisional law (Iowa Code 17A.19(10)(b)), and "[b]ased upon an erroneous interpretation of a provision of law whose interpretation has not clearly been vested by a provision of law in the discretion of the agency" (Iowa Code 17A.19(10)(c)). In issuing fetal death certificates, the Department relies on Iowa Code 144.13(2), which mandates that a mother's spouse be listed on a birth certificate as the parent of a child born during the marriage. Appendix at Ex. 6 (Department's Answer to Interrogatories No. 3, 5, 11); Ex. 14 (emails produced by the Department in discovery in which the Department repeatedly issued formal public statements explaining that it is bound by the presumption of parentage contained in Iowa Code 144.13(2) when issuing fetal death certificates as well as birth certificates). Accordingly, when different-sex spouses have suffered a stillbirth, the Department follows this statutory directive to name the mother's spouse as the stillborn baby's parent on the death certificate. Two other Iowa statutes similarly establish that a child born to a married woman is the legitimate child of both spouses. Iowa Code 252A.3; Iowa Code 598.31. Now that same-sex couples may marry in Iowa, *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009), these provisions apply equally to children born to same-sex spouses. *See Gartner v. Iowa Dept. of Public Health*, Polk County Dist. Ct. No. CE 67807, *appeal pending* (Ruling on Petition for Judicial Review dated Jan. 4, 2012) (interpreting the above statutes to require the

Department to issue birth certificate identifying lesbian spouse as child's second parent upon birth of child in reliance on the spousal presumption of parentage). Because in Brayden's case, the Department ignored the mandate in statutes and case law that a child born to married parents has two parents, the Department is in violation of both statutory and decisional law, and, to the extent that its act is based on a contrary interpretation of these laws and precedents, the Department's interpretation is erroneous. Iowa Code 17A.19(10)(b), (c).

Additionally, as explained in greater detail below, the Department's action was "motivated by an improper purpose" (Iowa Code 17A.19(10)(e)), and is "[u]nconstitutional on its face or as applied or is based upon a provision of law that is unconstitutional on its face or as applied" (Iowa Code 17A.19(10)(a)). By treating Jennifer and Jessica differently from the way the Department treats different-sex spouses who have gone through a similar tragedy, the Department deprives Jessica and Jennifer of equality under the law. Iowa Const. Art. I §§ 1, 6. There is no justification, let alone a constitutionally adequate one, for visiting this harm and unnecessary suffering on Jessica and Jennifer.

Accordingly, Jessica and Jennifer respectfully urge the Court to: 1) declare that the Department's refusal to issue a fetal death certificate for Brayden on the same terms as fetal death certificates issued after different-sex spouses have suffered a stillbirth violates Iowa law and is inconsistent with its own past practice and precedents without a fair and rational basis for the inconsistency; 2) to order the Department to issue an accurate fetal death certificate for Brayden Bruce Buntemeyer that lists both Jessica and Jennifer as his parents; and 3) to enjoin the Department from refusing to issue two-parent fetal death certificates to same-sex spouses in the future.

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"). In reviewing such agency action, a court may reverse, modify, affirm, or remand to the agency for further proceedings if the agency's action is erroneous under a ground specified in the Act and a party's substantial rights have been prejudiced. *Second Injury Fund of Iowa v. George,* 737 N.W.2d 141 (Iowa 2007).[1]

Because the legislature in this case has not clearly vested in the agency interpretation of any relevant statute, the Department's interpretation deserves no deference, and this Court's review of the Department's action is for errors at law. 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 respect 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) ("disavow[ing] the concept of limited deference for agency interpretations within the agency's expertise"); *see, also, Gartner,* Polk County Dist. Ct. No. CE 67807, *appeal pending* (Ruling on Petition for Judicial Review dated Jan. 4, 2012), citing *Renda*

[1] 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). The Department acknowledges that its challenged action in this case falls 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"), and that Petitioners have exhausted all administrative remedies and continue to be aggrieved and adversely affected by final agency action. *See* the Department's Answer at ¶15.

v. Iowa Civil Rights Com'n, 784 N.W.2d 8, 13-14 (Iowa 2010).[2]

Here, there is no dispute with respect to any material fact, and both the Department and Jessica and Jennifer believe that exhibits, including affidavits, are essential to this Court's ability to make an informed determination. Therefore this Court's determination of the issues raised by the Petition is akin to a decision made on summary judgment. Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See* Iowa R. Civ. P. 1.981(3). Because there are no genuine issues of material fact that bar entry of summary judgment to Jessica and Jennifer, *see* Iowa R. Civ. P. 1.981(3); *Phillips v. Covenant Clinic,* 625 N.W.2d 714, 717 (Iowa 2001), Jessica and Jennifer are entitled to the remedies they seek in their Petition.

ARGUMENT

I. The Department's refusal to issue a two-parent fetal death certificate for Brayden in reliance on the spousal presumption violates Iowa statutory and decisional law and is unjustifiably inconsistent with the Department's prior practice and precedents.

Iowa law requires the Department to file and register a fetal death certificate for stillbirths after a gestation period of twenty completed weeks or greater, or for a fetus with a weight of three hundred fifty grams or more. Iowa Code 144.29. Although Iowa law does not contain a provision specific to fetal death certificates concerning how to determine the identity of a

[2] An agency's authority to adopt, enact, and implement rules governing a particular subject area "is not the same as the power to interpret them," "does not qualify as a legislative delegation of discretion to the agency," and therefore does not justify any deference to agency interpretation. *Eyecare, supra,* 770 N.W.2d at 836. Legislative delegation of discretion to an agency must be clear and explicit before deference is warranted. *See, also, The Sherwin-Williams Co. v. Iowa Dep't of Revenue,* 789 N.W.2d 417 (Iowa 2010).

stillborn baby's parents, three generally applicable statutes, numerous court decisions, and two opinions of the Attorney General establish that both spouses are the legal parents of a child born during a marriage. *See, e.g.,* Iowa Code 252A.3; 598.31; 144.13(2). In accordance with this body of law, the Department's policy and consistent practice is to place both different-sex spouses on a fetal death certificate without any inquiry as to whether either spouse has a biological connection to the child. The Department can offer no fair or rational basis for departing from this practice with respect to Brayden, and the Department's deletion of Jennifer's name from Brayden's death certificate violates Iowa statutory and decisional law.

A. Both Jessica and Jennifer are Brayden's presumed parents under Iowa's longstanding spousal presumption of parentage.

If Brayden had lived, he would have had two parents at birth. 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]

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 children born to same-sex spouses. Indeed, the spousal presumption of parentage protects every child of married parents regardless of whether a spouse is the child's genetic parent, or whether a married couple is incapable of having children to whom they are both 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 "established 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.

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[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).

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, the Iowa Supreme 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, under Iowa law, the spousal presumption of parentage protects a child and his relationship to the mother's spouse regardless of whether the spouse has a biological connection to the child and regardless of whether the spouses were capable of conceiving the child without assisted reproductive technology.[4] As *Callender* and *Huisman, supra,* make clear, the spousal

[4] For the Department to ignore the spousal presumption in Brayden's case is particularly ironic given that Jennifer is actually Brayden's genetic parent. For lesbians to use this method of reproductive technology, which ensures that both members of the couple share a biological relationship to their child, is increasingly common. *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).

presumption has never functioned under Iowa law as a mere proxy for genetic paternity. 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 v. Heath*, 269 N.W. 761 (1937), in holding that, "[w]hen a child is born in wedlock, the law presumes legitimacy," the 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"). As the *Gartner* court put it, the purpose of the presumption is "to protect the integrity of families, regardless of biological connections." *Gartner,* Polk County Dist. Ct. No. CE 67807, *appeal pending* (Ruling on Petition for Judicial Review dated Jan. 4, 2012), at 11.

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, the *Varnum* 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 unconstitutional, 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, the *Varnum* court 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 the 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 the 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 II, below.

In *Varnum*, the 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). The 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").

The *Varnum* court 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, the 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*

[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).

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

Accordingly, because Jessica and Jennifer were married when Brayden was conceived, Iowa law provides that both Jessica and Jennifer are his parents. As described further below, there is no basis in Iowa law for ignoring the spousal presumption and eliminating one of his parents simply because he was stillborn.

B. Iowa Code 144.13(2) requires entry of both spouses' names on a child's birth certificate absent a court order determining that someone else is the child's parent; it is the Department's consistent practice to follow this mandate when issuing fetal death certificates.

Iowa law contains no statutory or regulatory directive specific to fetal death certificates concerning how to identify the parents on a death certificate issued to a married couple. However, the Department has stated repeatedly that it follows Iowa Code 144.13(2) (hereinafter "birth certificate law") when determining who constitutes a parent on a married couple's fetal death certificate. *See* Appendix at Ex. 6 (Department's Answer to Interrogatories Nos. 3, 5) "In practice, [the Department] has generally relied on the presumption of paternity statute in Iowa Code section 144.13(2) to register the name of a mother's husband as the father of the child on a fetal death certificate"; Answer to Interrogatory No. 18 ("if the mother is married at the time of conception, birth, or any time during that time period, the name of her husband is entered as the father of the child"); Appendix at Ex. 14 (consisting of several emails from spokesperson for the Department stating that "The department reports the information as defined by 144.13(2) and

(3)" on fetal death certificates).

> Iowa Code 144.13(2) 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).

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; *Gartner,* Polk County Dist. Ct. No. CE 67807, *appeal pending* (Ruling on Petition for Judicial Review dated Jan. 4, 2012). To construe Iowa birth certificate law, and the Department's corresponding obligation with respect to fetal death certificates, in a manner that excludes same-sex spouses and their children from two-parent vital records, while according such records to different-sex spouses who use the same reproductive technology to conceive, would violate the Iowa Constitution. *See* Point II, below.

The Department, however, insists that it "construes the term "father" to be the male, biological parent of a child . . . . The Department's position is that because a female cannot be the male, biological parent of a child it would be inaccurate to enter a female as a father on a certificate of fetal death." Appendix at Ex. 6 (Department's Response to Interrogatory No. 18). The Department appears to believe that its sole obligation is to determine biological paternity, and that only a male can qualify as a child's second parent by virtue of the spousal presumption.

That a married same-sex couple is incapable of procreating without reproductive technology is no reason to deny these families the benefit of the spousal presumption contained

in the birth certificate law. Consistent with the purpose of the spousal presumption itself, Iowa Code 144.13(2) has never served as a proxy for biology. 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* Appendix at Ex. 15 (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,* Appendix at Ex. 16 (Attorney General Opinion, July 16, 1945) (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.

The Department admits[6] that Iowa Code 144.13(2) requires the Department "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* Appendix at Ex. 7 (Department's Reply to

[6] Notably, all of Petitioners' Requests for Admission may be deemed admitted because the Department did not respond to them within the time provided by rule. Iowa Rule Civ. P. 1.510(2). However, Petitioners refer within this brief solely to the express admissions the Department provided.

Request for Admission No. 10). 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. The Department also admits that, in the context of fetal death certificates in particular, the Department "issues fetal death certificates listing both the woman who has carried a pregnancy resulting in a stillbirth and her husband as parents without any additional inquiry, paternity testing, or investigation as to whether the husband is the genetic father." Appendix at Ex. 7 (Department's Response to Request for Admission No. 1).

In the context of surrogacy arrangements, the Department similarly has recognized that Iowa Code 144.13(2) requires the Department to place a mother's spouse's name on a child's vital record 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 the Department 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 Appendix at Ex. 9 (document titled "Surrogate & Gestational Carrier Births," dated Nov. 2009 (emphasis in original); *see, also,* Appendix at Ex. 6 (Department's Response to Interrogatory No. 9) ("If the gestational surrogate is married her husband is presumed to be the

father pursuant to Iowa Code section 144.13(2)").[7]

The Department's consistent practice of putting both spouses on a child's vital record – whether on a birth or fetal death certificate, and regardless of whether the spouse has a biological connection to the child – finds support in guidance documents issued by the Centers for Disease Control and Prevention National Center for Health Statistics ("CDC"). In instructing state agencies how to fill out the parents' names on a fetal death certificates, the CDC writes:

> State laws vary. In general:
>
> > If the fetus was born to a mother who was married at the time of delivery, enter the name of her husband.
> >
> > If the fetus was conceived in wedlock but delivered after a divorce was granted or after the husband died, enter the name of the mother's deceased or divorced husband . . . .

[7] In the absence of any statutory or case law guidance in Iowa about surrogacy arrangements, the Department 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 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, 201) ("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 the Department in case law or statute concerning how to treat surrogacy arrangements, the Department 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 the Department'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.

Appendix at Ex. 13 (U.S. Department of Health and Human Services, Centers for Disease Control and Prevention National Center for Health Statistics, *Funeral Directors' Handbook on Death Registration and Fetal Death Reporting* (2003 Revision), DHHS Publication No. (PHS) 2005-1109 (produced by Respondent to Interrogatory Response 1) ("CDC Fetal Death Registration Handbook") at 38. The CDC Fetal Death Registration Handbook does not suggest in any way that an agency should seek out whether the husband is the stillborn baby's biological parent. To the contrary, the CDC's guidance reflects that in many states, including Iowa, the spousal presumption is conclusive with respect to how parentage is reflected in vital records.

Accordingly, the Department's "prior practice and precedents" have been to place the birth mother's spouse on a child's vital record in all circumstances – up until now, when the Department has singled out and denied married same-sex couples' requests for two-parent vital records for their children.[8] There is no fair or rational basis for this inconsistency.[9]

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[8] The Department states that it occasionally departs from Iowa Code 144.13 with respect to fetal death certificates issued to *unmarried* women. Appendix at Ex. 6 (Department's Answer to Interrogatory No. 6). When an unmarried woman indicates the genetic father of the stillborn baby on a worksheet, the Department lists the father's name on the fetal death certificate without requiring him to go through the process of a voluntary acknowledgement of paternity. It has no relevance here that the Department has departed from the procedure used for birth certificates in the case of *unwed* mothers in order to prevent a father from having to go through the legal process of an acknowledgement of paternity when grieving the loss of a child. Where the mother is married, the spousal presumption applies, and the Department's practice is to follow Iowa Code 144.13 in placing the husband's name on a fetal death certificate.

[9] The Department's refusal to place both same-sex spouses' names on children's vital records is particularly puzzling given that the state agencies in every other state where same-sex couples may marry or enter into civil unions or comprehensive domestic partnerships (CA, CT, D.C., IL, MA, MD, NH, NV, NY, VT, WA) respect the spousal presumption of parentage for same-sex couples and issue vital records accordingly. *See, e.g.*, *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal., 2005); *Freda v. Freda*, 476 A.2d 153, 155 (Conn. Super. Ct. 1984) (acknowledging that children born during marriage are presumed to be legitimate); D.C. Code 16-909(a-1)(2); 750 ILCS 45/5; 410 ILCS 535/12, 750 ILCS 5/212, 750 ILCS 5/303, 750 ILCS 40/2, 750 ILCS 40/3; *Della Corte v. Ramirez*, 961 N.E.2d 601, 602-04 (Mass. Ct. App. 2012).; Michael Levenson,

In discovery, the Department cites several justifications, all erroneous. First, the Department argues that fetal death certificates serve no purpose except collection of data about biological parentage, and therefore the Department is free to alter fetal death certificates to conform to its best guess as to who the genetic parents might be, without any regard to who constitutes a legal parent. The Department argues that its use of guesswork does not matter to families because there are no legal rights or responsibilities that attach with respect to a child who never lived. The Department is incorrect.[10] As described further below, a fetal death certificate serves a significant purpose to many parents. It is their sole legal record of their lost baby. For grieving parents, the death certificate can be essential to their healing and ability to move on with their lives. *See* Point IC, below. Moreover, the Department can satisfy its interest in data collection through a process independent of issuance of fetal death certificates to parents seeking a record of their stillborn children. And finally, even if the Department's desire for its fetal death certificates to track genetic relationships were rational, and it is not, deleting

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Birth Certificate Policy Draws Fire: Change Affects Same-Sex Couples, Boston Globe, July 22, 2005, at B1; 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); *Debra H. v. Janice R.*, 930 N.E.2d 184 (N.Y. 2010); Nev. Rev. Stat. 126.051(1), 126.061(1); http://www.dshs.wa.gov/pdf/publications/22-586.pdf (state vital records agency publication explaining that child born to registered domestic partners in Washington is presumed child of both partners); *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).

[10] For some families, the absence of a parent's name on a fetal death certificate could have tangible as well as emotional implications. For example, because only an immediate family member may request a certified copy of the certificate, Jennifer may be precluded even from asking for a copy of Brayden's death certificate in the future as a result of the elimination of her name on it. Iowa Code §144.43; Iowa Admin. Code 641-96.7. The elimination of a parent's name on a fetal death certificate also could have potential implications with respect to insurance coverage for autopsy or funeral home expenses.

Jennifer's name defeats this purpose. Here, the Department's best guess as to genetic parentage resulted in the deletion of the genetic parent from the stillborn baby's death record. Iowa law does not permit the Department to make guesses and assumptions about the vital record of a married couple's child.

The Department also argues that Iowa Code 252A.3 and 598.31 fall outside the vital statistics chapter, and therefore the Department should be free to ignore them. *See, e.g.*, Appendix at Ex. 6 (Department's Answer to Interrogatory No. 16). However, there is no authority for the notion that a state agency may disregard laws in chapters other than the one that it administers directly. An 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.

C. Fetal death certificates serve a vital purpose to grieving families, and the Department's deletion of Jennifer's name from Brayden's certificate caused Jennifer and Jessica unnecessary pain.

Parents who joyfully anticipate the birth of a child experience heartbreak when the child is stillborn. A fetal death certificate is the sole legal record for these families that documents the existence of the baby they lost. As the CDC recognizes in its first words in the introduction to its handbook on death and fetal death reporting, "The death certificate is a permanent legal record of the fact of death of an individual. As a permanent legal record, the certificate is extremely important to the decedent's family." Appendix at Ex. 13 (CDC Fetal Death Registration Handbook) at 1.

The Department itself has recognized in its "Fetal Death Evaluation Protocol" that families can suffer extreme emotional pain after a stillbirth. The Department writes, "In addition

to investigating the medical aspects of a stillbirth, it is important to consider the psychological effects on the family." Appendix at Ex. 12 (Fetal Death Evaluation Protocol, Iowa Department of Public Health (2011 revision) ("Fetal Death Protocol")) at 19. The protocol refers to the parents' experience as "heartbreak," and devotes a section to "Grief and Family Support" and provides that grieving parents should have access to counseling and support groups, assessment for depression, and follow-up postpartum to determine whether the family has an adequate support system. *Id.* at 15-16. "Grief support should be initiated as soon as the diagnosis is made" and professionals who interact with families who have suffered a stillbirth should have "an understanding of the dynamics of the grief process." *Id.* at 19, 26, 52.

The Department also recognizes that families grieving a stillbirth have a particular need for tangible mementos and evidence of the fact of their stillborn child's very existence in order to heal and find closure. The Department writes:

> When an older child dies, or an adult loved one dies, the mourning process includes relating closely to the deceased by remembering times and relationships shared. When a child dies during pregnancy or as a newborn, there has been little time to share a relationship with the child as a separate person. As a result, the family is left to mourn the loss of a part of themselves without the aid of memories and mementos.

Appendix at Ex. 12 (Fetal Death Protocol) at 29. Accordingly, the Department encourages parents to take pictures with their baby and create other physical mementos that may help them heal as they mourn:

> While the initial response to keeping footprints, pictures, crib card, or lock of hair may be negative; these items take on special significance as proof that the child existed. It is important to encourage families to spend time saying hello, getting to know their child. This is critical before they say goodbye. They are "squeezing" a lifetime of memories and mothering/fathering in to those few hours and days. …. A funeral or memorial service is appropriate according to the parent's wishes. It is the one thing they can do for their child and is an important ritual for saying goodbye, also providing for memories that can help heal over time.

Id. at 29.

Not every family will feel the need for this kind of closure, but for the Buntemeyer family, it was extremely important. Jennifer's and Jessica's feelings of grief after the loss of Brayden were overwhelming. "I was so excited to share life with Jess, the love of my life. I knew I was lucky to be able to create a life and have the love of my life birth our child. But now, Brayden is gone and there will always be a hole in my heart. I will never be whole-heartedly happy again in this life." Jennifer Aff. at ¶18. "Brayden was a miracle of life for me," states Jennifer. *Id.* at ¶ 17. "The doctors even remarked how they were amazed Jess became pregnant because my eggs did not metastasize to the grade A level they expect. Brayden was my only chance at my own flesh and blood because the rest of my eggs could not be kept. It is too costly both financially, physically, and emotionally to attempt another pregnancy through in vitro fertilization." *Id.*

Their families were devastated as well. Jennifer's mother and father had been thrilled about the pregnancy, and her father was particularly excited because Jennifer and Jessica had decided to name the baby after him. Jennifer Aff. at ¶9. Jennifer's father and mother, her brother and his wife, and Jessica's sister went to the hospital for the birth and stayed there for 30 hours with Jennifer and Jessica as she want through extended labor. *Id.* at ¶10. Jessica's grandmother had knitted Brayden a blanket, and the family swaddled him in it. *Id.* at ¶11. The family "took turns crying and holding him and commenting on how beautiful he was and how much he looked like [Jennifer]. At one point [Jennifer's brother] Jason took him in his arms and went into the corner hugging him and crying silently." *Id.* Jennifer states, "That evening was the first time I have ever seen my father cry and the first time in ten years I have seen my brother cry." *Id.* at ¶12.

In preparation for the memorial service, Jessica and Jennifer spent a week collecting photographs of their pregnancy to document their love for Brayden, and the love of their respective families for him. *Id.* at ¶14. They created a six-minute video that they showed at the memorial service "so that everyone who went to the memorial could see how much he was loved and we could watch it as a reminder of the love we had and will continue to have for him for the rest of our lives." *Id.*; *see also* Jennifer Aff. at Ex. 4A (copy of the video). "All of our family and friends came to the memorial to remember Brayden's short but sweet little life and remarked on how bittersweet our video was – and that it was perfect to show how much we loved and anticipated his arrival." Jennifer Aff. at ¶14. Consistent with the Department's suggestion that families "plan for and celebrate holidays and anniversaries including their baby whenever possible," *see* Fetal Death Protocolat 29, Jennifer and Jessica decorated Brayden's crib for Christmas and Easter with small items they would have shared with him had he lived. Jennifer Aff. at 4B (photos).

Of all of the items that "take on special significance as proof that the child existed" (Fetal Death Protocol at 29), the fetal death certificate is the most important, as it is the family's sole legal record of the child and his relationship to his family. Here, not only did the Department deprive the Buntemeyer family of this record, but the Department compounded their suffering, and added insult to their pain. Jennifer "was completely dumbfounded" that the State erased her name from Brayden's death certificate. Jennifer Aff. at ¶16. "I couldn't believe they would deny that I was his parent." *Id.* Jessica states, "It was such a disappointment knowing that after everything we were going through already, the State was denying us something that we never imagined to be a problem since we were a married couple. That fact that we were denied the recognition that we are both Brayden's parents was so heartbreaking. Jessica Aff. at ¶10.

Instead of affirming Brayden's significance to the Buntemeyer family, the Department denied it altogether. "Instead of treating us as a married couple jointly mourning our stillborn son, [the Department] labeled Jess a single woman, and Brayden as born out of wedlock – making my love and my contributions and my devotion completely invisible." [11] Jennifer Aff. at ¶19. "Because the Iowa Department of Public Health erased Jennifer's name from Brayden's death certificate, we have no official record of what he meant to both of us, which is a loss we continue to deal with every day." Jessica Aff. at ¶15.

II. The Department's denial of an accurate fetal death certificate for Brayden listing both Jennifer and Jessica as his parents deprives Jennifer and Jessica of equal protection of the law.

The Department's action in deleting Jennifer's name from Brayden's death certificate singled out Jennifer and Jessica for adverse treatment because of their sex and sexual orientation and deprived them of equal protection. Further, the Department's action was motivated by improper purposes, *see*, Iowa Code 17A.19(10)(e), warranting a judgment in Petitioners' favor on the ground of unconstitutionality on this basis alone.

The Department claims that it acted in reliance on Iowa Code 144.13(2), and contends that the gendered language of this law permits the Department to deny two-parent vital records to children born to same-sex spouses. As explained above, the Department's interpretation of Iowa Code 144.13(2) is incorrect, and this law must be construed to mandate issuance of vital records to children of same-sex spouses identifying both spouses as parents. As such, it is constitutional. However, if interpreted as the Department advocates, the law would be unconstitutional both on

[11] A vital record that lists a child as having only one parent designates the child as "illegitimate" under Iowa law. Iowa Code 600B.35; Iowa Admin. Code 641-96.6(4); *see also* Appendix at Ex. 11 (Department's instructions to county recorders to seal and/or purge records of out-of-wedlock births prior to July 1, 1995, and records that contain evidence of "legitimation").

its face and as applied, *see* Iowa Code 17A.19(10)(a).

Finally, even if the Department did not have a prior practice and precedent of following the birth certificate law when issuing fetal death certificates, and even if the other Iowa statutes and case law that establish Jennifer as a parent to Brayden by law did not exist, and the Department therefore enjoyed unfettered discretion in issuing fetal death certificates (which it does not), the Department still may not issue vital records in a manner that singles out same-sex parents and their children for discriminatory treatment in violation of the Iowa Constitution.

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 fetal death certificate for Brayden treats Jennifer and Jessica adversely based on their sex and sexual orientation.

A. Jennifer and Jessica are similarly situated to families who receive fetal death certificates listing both spouses as parents in reliance on the spousal presumption of parentage.

Jennifer's and Jessica'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). The Department enters the husband in such families as the parent on vital fetal death certificates without "additional inquiry, paternity testing, or court or investigation as to whether the husband is the genetic father." Appendix at Ex. 7 (Department's Answer to

Request for Admission No. 1). Jennifer and Jessica have the same need for an accurate fetal death certificate as do different-sex spouses who have suffered a similar tragedy.

B. As interpreted by the Department, 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.

The Department admits that its interpretation of Iowa Code 144.13(2) as permitting the Department to refuse to list both same-sex spouses on the vital record of a child born during the marriage classifies persons on the basis of sex. Appendix at Ex. 7 (Department's Response to Request for Admission No. 13). 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 the Department 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. In discovery, the Department disputes this, 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. Appendix at Ex. 7 (Department's Response to Request for Admission No. 14). The Iowa Supreme Court disposed of this defective analysis in *Varnum.* There, the defendant 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 orientation 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.[12]

[12] The birth certificate law, as interpreted by the Department, 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

C. As interpreted by the Department, 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);[13] *Rake v. Ohden,* 346 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). 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

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circumstances of their birth by denying them important rights and protections. *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175, 176 (1972).

[13] 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 Constitution'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.

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*

The Department 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. Denial of two-parent vital records to children born to same-sex spouses does not serve even a legitimate purpose, let alone a substantially important or compelling one; nor does it serve such interests in an adequately tailored manner. Iowa Code 17A.19(10)(a).

The Department argues that naming Jennifer as Brayden's parent defeats its interest in collecting "paternal information obtained from fetal death certificates for public health purposes and programming and provides such information to researchers to be used for furthering research." Appendix at Ex. 6 (Department's Answer to Interrogatory No. 6). However, the Department could satisfy its interest by data collection without altering the fetal death certificates issued to parents. Moreover, Iowa law – both statutory and decisional – long has made clear that any such interest in collecting data for research 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 vital records 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 that these facts are not reflected on vital records.

The Department cannot demonstrate even a rational relationship, let alone a substantial or

narrowly tailored one, between the state interest it cites and its denial of two-parent vital records to children of same-sex spouses. Accordingly, the Department's action, and Iowa Code 144.13(2), as construed by the Department, violate the equality guarantees of the Iowa Constitution, Article I, §§ 1 and 6.

D. The Department's expressed justifications for altering Brayden's death certificate reflect illegitimate purposes and therefore fail under any standard of review.

As interpreted by the Department, Iowa Code 144.13(2) discriminates on its face against Jennifer and Jessica. Discrimination also is evident in the Department's action in denying Jennifer and Jessica a two-parent death certificate for Brayden. 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 the Department 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 illegitimate 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 the

Department for the denial of an accurate fetal death certificate include:

1) Preferring biological parent-child relationships over other legal parent-child relationships, and preferring traditional family structures over non-traditional family structures.[14] The Department's preference for traditional biological 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.

2) 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").

The Department's action in denying Jennifer and Jessica a death certificate for Brayden

[14] The Department's purpose of preferring biological relationships over other legal parent-child relationships is evidenced in the Department's references in discovery to vital records that document non-biological parentage uniformly as "inaccurate," regardless of whether they are consistent with legal parent-child relationships. Appendix at Ex. 6 (Department's Answer to Interrogatories No. 18, 20).

that lists both of them as parents is unconstitutional because of the presence of these impermissible purposes. *RACI,* 675 N.W.2d at 15.

CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, Jennifer and Jessica respectfully request that the relief requested in their Petition be granted in full on the ground(s) that the Department's elimination of Jennifer from Brayden's death certificate 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 by a provision of law 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, the Department'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 the Department suggests, the statute is unconstitutional both on its face and as applied (*id*). Finally, the Department's action was motivated by improper purposes (Iowa Code 17A.19(10)(e)) and is therefore unconstitutional on this ground as well.

Accordingly, Jennifer and Jessica request that the Court (1) declare: that Iowa statutory and decisional law entitles same-sex spouses who have experienced a stillbirth to a fetal death certificate listing both spouses as parents; or alternatively, that (2) Iowa Code 144.13(2) is invalid and unconstitutional as written and is to be read in a gender neutral manner; that the children of married same-sex couples otherwise entitled to vital records listing both spouses as parents, including Jessica and Jennifer, may not be denied such birth certificates, and (3) enjoin the Department to issue such a corrected fetal death certificate for Brayden immediately to Jessica and Jennifer listing both Jessica and Jennifer as his parents; (4) issue a Writ of

Mandamus, as necessary, requiring the Department immediately to issue a corrected fetal death certificate for Brayden listing both Jessica and Jennifer as his parents; (5) award Jessica and Jennifer costs incurred herein; and (6) award such other and further relief to Jessica and Jennifer as the Court deems just and proper.

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CERTIFICATE OF SERVICE

The undersigned hereby certify that a copy of the foregoing brief and appendix 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 Des Moines, Iowa, June 18, 2012.

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