IN THE SUPREME COURT OF IOWA
Supreme Court Case No. 12-0243

IOWA DEPARTMENT OF PUBLIC HEALTH

Respondent-Appellant,

v.

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

Petitioners-Appellees.

On appeal from the Iowa District Court for Polk County
District Court Case No. CE067807

BRIEF OF *AMICI CURIAE* LAW PROFESSORS IN SUPPORT OF PETITIONERS-APPELLEES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES (continued)

RULES AND STATUTES

OTHER AUTHORITIES

INTEREST OF *AMICI*

Amici are family law and sexual orientation law professors in Iowa and other states whose scholarship and expertise include the rights and responsibilities of same-sex couples, as well as marital rights and benefits, family formation, and parent-child relationships. *Amici* submit that their expertise can be useful to this Court in evaluating the application of the marital presumption law to a woman who is married to a child's birth mother, and whether applying this presumption requires that she be placed on the birth certificate of the parties' child under Iowa law.

Amici include the following law professors[1]:

Patricia Cain, Aliber Family Chair Emeritus, University of Iowa, College of Law;

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INTRODUCTION

In *Varnum v. Brien*, this Court held that excluding same-sex couples from marriage violated the equal protection guarantee of the Iowa Constitution and that same-sex couples must be given "full access to the institution of civil marriage." 763 N.W.2d 862, 907 (Iowa 2009). This Court held that laws that discriminate based on sexual orientation must satisfy heightened scrutiny by being "substantially related to an important governmental objective," and that denying same-sex couples the ability to marry could not meet this heightened scrutiny. *Id.* at 896-97. This Court recognized that "Iowa's marriage laws . . . are designed to bring a sense of order to the legal relationships of committed couples and their families in myriad ways." *Id.* at 883. In its ruling, this Court specifically identified the marital presumption as one of the benefits that was unconstitutionally denied to same-sex couples and their children by Iowa's previous marriage law. *Id.*

at 902 n.28 (citing the marital presumption in Iowa Code section 252A.3 (4) as an example of one of over two hundred Iowa statutes that benefit married couples).

The marital presumption is an integral part of Iowa's marriage laws. From the moment a child is born, the presumption provides married couples and their children the security, clarity, and convenience of establishing that a marital child has two legal parents. Denying these benefits to married same-sex couples and their children would harm those families and violate Iowa's equal protection clause. *Varnum*, 763 N.W.2d at 906 ("We are firmly convinced the exclusion of gay and lesbian people from the institution of civil marriage does not substantially further any important governmental objective.").[2]

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[2] Despite this Court's clear ruling, the State argues that the marital presumption of parentage does not apply to same-sex spouses. (State's brief p. 39). *See also* Iowa Family Policy Center brief pp. 10-12 (arguing that the marital presumption is not a benefit of marriage and should not be extended to same-sex spouses). This misreading and narrowing of *Varnum* is unwarranted and would violate the equal protection rights of same-sex couples.

I. UNDER *VARNUM V. BRIEN*, THE MARITAL PRESUMPTION APPLIES TO A BIRTH MOTHER'S SAME-SEX SPOUSE.

A. The Holding in *Varnum* Applies to All Marital Rights and Benefits, Including Those Affecting Children.

With no equivocation, this Court held in *Varnum* that "for purposes of Iowa's marriage laws," same-sex couples "are similarly situated [to opposite-sex couples] in *every* important respect, but for their sexual orientation." 763 N.W.2d at 883-84 (emphasis added). The Court found that many same-sex couples are "raising families," *id.* at 883, and held that "[s]ociety benefits . . . from providing same-sex couples a stable framework within which to raise their children . . ., just as it does when that framework is provided for opposite-sex couples," *id.* at 883. The Court concluded that "the language in Iowa Code section 595.2 limiting civil marriage to a man and a woman must be stricken from the statute," and 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." *Id.* at 907. The State argues that application of the decision in *Varnum* to same-sex couples applies only to statutes that affect the reciprocal rights and obligations of the two spouses to a marriage, but not to statutes that "impact parties outside the marriage civil contract: for example those which affect

third parties such as the actual biological parent of a child and the child him or herself." (State's brief p. 42). This Court's holding in *Varnum*, however, explicitly recognized that one of the benefits of marriage denied to same-sex couples is the marital presumption of parentage, and that protecting the children of same-sex couples is an important benefit of marriage that cannot be denied to same-sex couples. *Varnum*, 763 N.W.2d at 901, 902 n.28. This Court recognized that the State has no valid interest in excluding children from the benefits of allowing their parents to marry and that doing so harms the children of same-sex couples "who are denied an environment supported by the benefits of marriage under the statute." *Id.* at 901. There can be no serious dispute that as a constitutional matter of equal protection, Iowa's marital presumption must be applied equally to married same-sex couples and their children.

B. *Varnum* Requires Gendered Terms Such as "Husband" and "Paternity" To Be Applied Equally to Same-Sex Spouses.

In *Varnum*, this Court expressly held that all of Iowa's statutes relating to marriage "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. Many of Iowa's statutes refer to the rights and obligations of married couples in gendered terms of "husband" and "wife."

After *Varnum*, these statutes apply equally to same-sex and to opposite-sex spouses. A conclusion that statutes using gendered terms cannot be applied to same-sex spouses would render the *Varnum* decision nugatory.

After *Varnum*, any statute that refers to a husband and a wife must be interpreted to apply equally to same-sex spouses. For example, the statute providing that spousal communications are privileged explicitly covers communications between a husband and a wife. Iowa Code § 622.9 (2012) ("Neither husband nor wife can be examined in any case as to any communication made by the one to the other while married, nor shall they, after the marriage relation ceases, be permitted to reveal in testimony any such communication made while the marriage subsisted."). Although it uses gendered language, this statute must be interpreted under *Varnum* to provide that communications between same-sex spouses are also privileged. Likewise, to give meaning and effect to the *Varnum* decision, statutes (including Iowa Code sections 252A and 144.13) and case law referring to the marital presumption also must apply in the same manner to same-sex married spouses. *Varnum*, 763 N.W.2d at 907.

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C. Applying the Marital Presumption Equally to Same-Sex Spouses Would Benefit Those Families Enormously.

The marital presumption is one of the most important benefits provided to married couples and their children. The benefit to a child of having two legal parents from the moment of the child's birth is inestimable. Automatic recognition of parentage from birth ensures, for example, that the spouse is recognized as a parent in the event of health complications during birth, allows the spouse to add the child to his or her health insurance from birth, and provides the child with Social Security and inheritance rights if something were to happen to the non-biological parent.

The State argues that applying the marital presumption to same-sex spouses would undermine their family stability because adoption provides them with more secure protections if they move to or travel in another state. (State's brief pp. 48-49). It is irrational to argue that *denying* a protection to families provides them with stability merely because there is another procedure they may potentially access to protect their families—especially where the alternative procedure is much more expensive, cumbersome, and intrusive. Adoption is less protective because adoption proceedings cannot be initiated until after birth, and typically take several months or more to complete. Refusing to apply the marital presumption to same-sex married

spouses would mean that the family and, most importantly, the children would be unprotected during this time.

Adoption may be advisable for same-sex parents seeking interstate recognition of their parental status, but the fact that other states may discriminate against same-sex spouses and their children cannot justify the denial of equal application of *Iowa* laws and the serious harms that would befall same-sex spouses and their children denied the automatic protections of the Iowa marital presumption.

In *Goodridge v. Dep't of Public Health*, the Massachusetts Supreme Judicial Court succinctly captured the harm caused to same-sex parents by excluding them from the marital presumption and requiring them to rely on adoption to secure their parental rights: "While establishing the parentage of children as soon as possible is crucial to the safety and welfare of children, . . . , same-sex couples must undergo the sometimes lengthy and intrusive process of second-parent adoption to establish their joint parentage." 798 N.E.2d 941, 963 (Mass. 2003) (holding that same-sex couples and their children must be given equal access to all of the rights and protections of marriage, including the marital presumption).

Requiring same-sex married couples to adopt to establish their parental rights but allowing opposite-sex spouses to have the benefit of the

marital presumption whether or not they are biological parents would violate equal protection under *Varnum*. This Court clearly held that same-sex couples must be given "full access to the institution of civil marriage" because denying them these rights is not "substantially related to an important governmental objective." *Varnum*, 763 N.W.2d at 896-97, 907. For the same reasons that opposite-sex spouses who use assisted reproduction to conceive are automatically presumed to be legal parents, same-sex spouses who do so should also be presumed to be legal parents without having to adopt. This automatic recognition from birth protects the health, stability, and well-being of these families and their children.

II. IOWA'S MARITAL PRESUMPTION DOES NOT REQUIRE A BIOLOGICAL TIE AND CAN READILY BE APPLIED TO A BIRTH MOTHER'S FEMALE SPOUSE.

Iowa's marital presumption is based on marriage, not biology, and applies regardless of whether a husband is a child's biological father. Once established, this presumption of parentage is not automatically overcome by evidence of a lack of biological connection. This presumption can and must be applied equally to a same-sex spouse.

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A. Iowa's Marital Presumption Is Not Automatically Overcome by the Absence of a Biological Tie.

Under Iowa law a husband is presumed to be the father of a child born or conceived during marriage regardless of whether he is the child's biological father.[3] Iowa Code §§ 252A.3(4) & 144.13(2) (2012); *Callender v. Skiles*, 591 N.W.2d 182, 185 (Iowa 1999). A husband who was married to the mother at the time of birth is an "established father" "by operation of law" and is treated the same as a father whose parentage has been adjudicated by a court or administrative order, or who has filed an affidavit of paternity. Iowa Code § 600B.41A (2012); *Callender*, 591 N.W.2d at 185 (the term "established father" is a legal term of art and "refers to paternity which has been established by some means authorized by law"). The

[3] The State argues that the marital presumption should not apply to same-sex married couples because while the marital presumption statutes use the term "legitimate," Iowa Code section 144.13(2) provides that the husband's name should be listed on a child's birth certificate unless "paternity" has been determined otherwise—suggesting, in the State's view, that "paternity" and "legitimacy" are "different concept[s]." (State's brief pp. 37-38). In fact, however, this Court has repeatedly held that the legitimacy provision in Iowa Code section 252A.3(4) means that a husband is the legal father of a child born to his wife—*i.e.*, "legitimacy" refers to and is equivalent to a husband's legal "paternity," regardless of whether he is the biological father. *See, e.g., Callender v Skiles,* 591 N.W.2d at 185 (construing section 252A.3(4) to mean that "[t]he law deems [the husband] to be [the child's] father by virtue of his marriage to [the child's mother]"); *State v. Romaine,* 11 N.W. 721, 721-23 (Iowa 1882) (the presumption of legitimacy means that the husband is deemed to be a child's legal father).

paternity of an established father may be challenged only in an action to disestablish his paternity.[4] Iowa Code §§ 600B.41A, 598.21E (2012); *Callender,* 591 N.W.2d at 185; *In re Marriage of Steinke*, 801 N.W.2d 34 (Table), 2011 WL 1584834, at *8 (Iowa Ct. App. 2011) (Decision Without Published Opinion). Even where testing has established that another man is a child's genetic father, a husband who is an established parent must be recognized as the child's legal parent unless and until his paternity is overcome in a judicial action. *See Callender*, 591 N.W.2d at 185 (blood tests showing that another man was a child's biological father did not automatically disestablish the husband's legal paternity because a husband's paternity can only be disestablished in a judicial action).

Moreover, even when a judicial proceeding is brought, a husband's paternity is not automatically disestablished by genetic tests excluding him

[4] The State suggests that the term "paternity" is the equivalent of "biological father." (State's brief pp. 26-27). Contrary to this suggestion, however, while a man whose paternity has been established *may* be a child's biological parent, he *need not be*. "Paternity" is a legal concept that refers to the legal parentage of a child. Under Iowa law, the absence of a biological tie does not necessarily overcome the marital presumption of paternity. In addition, a genetic test identifying the biological father of a child born outside of a marriage creates only a rebuttable presumption of paternity. *Callender*, 591 N.W.2d at 185; Iowa Code § 600B.41A(6) (2012). If the term "paternity" was the equivalent of "biological father," biology would be the only way to establish paternity, a non-biological father could never be a child's legal father, and genetic testing would establish a conclusive presumption of paternity.

as a biological father. To the contrary, Iowa Code section 600B.41A provides that the court "may" rule that established paternity is overcome if blood tests exclude the established father as a biological father and a number of other requirements are met.[5] As the use of the permissive term "may" indicates, disestablishment is not mandatory upon proof that the established father is not the biological father. Instead, the provision goes on to state that under such circumstances, the husband's paternity may be preserved if doing so is in the best interests of the child, the husband wishes to maintain his parental status, and either the biological father does not object or the court grants the husband's petition to terminate the biological parent's rights. As this Court has noted, "Iowa has not adopted a statute that provides that blood and genetic tests are conclusive evidence of nonpaternity." *Petition of Bruce*, 522 N.W.2d 67, 70 (Iowa 1994); *see also Callender*, 591 N.W.2d at 185 ("blood tests can lead to the establishment of paternity, but they do not establish paternity without a court order"). In sum, a blood test excluding a husband as a biological father is not legally conclusive and does not by itself answer the question of whether his presumption of paternity should be overcome.

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[5] Additionally, Iowa Code section 598.21E(1)(c) provides that a husband's established paternity "may" also be overcome if the mother and father file a written statement agreeing that he is not the biological father of the child.

These statutory principles are consistent with longstanding Iowa case law. Long before the current parentage statutes were enacted, Iowa courts recognized that the purpose of the marital presumption is not exclusively or even primarily to identify a child's biological father. Instead, the primary purpose of the marital presumption is to protect the stability of the marriage and the best interests of marital children. For example, in *State v. Shoemaker*, 17 N.W. 589, 589-90 (Iowa 1883), this Court held that a man who marries a woman he knows to be pregnant becomes liable for the child's support as a parent and is barred from later seeking to bring an action for support against the biological father. *Id.* at 590 (when the marriage is entered, "the law raises a conclusive presumption that the husband is the father of his wife's . . . child"). In *In re Marriage of Gallagher*, a husband raised a child born during the marriage for two years and later discovered he was not the biological father. 539 N.W.2d 479, 480 (Iowa 1995). Consistent with this goal of family stability and child welfare, this Court recognized that the longstanding father-child relationship and the best interests of the child were relevant to determining whether the husband was the child's legal father. *Id.* at 480-482.

The current parentage laws maintain this commitment to encouraging parental responsibility and protecting established parent-child bonds. As

both the Legislature and the courts have consistently recognized, there are many circumstances in which a husband who is not a biological father is nonetheless a legal father. For example, this Court has held that although a putative biological father has a constitutionally protected right to some procedural mechanism to assert his paternity, when the putative biological father has failed to act promptly to establish his rights, or has allowed the husband to develop a parent-child relationship, the biological father waives his right to bring an action to overcome the husband's parentage. *Callender*, 591 N.W.2d at 192. Thus, in a number of cases, this Court has concluded that a husband was a child's legal father, even though the husband was not the child's biological father. In *Huisman v. Miedema*, the husband raised a child as his own for seven years even though he knew he might not be the biological father. 644 N.W.2d 321, 322 (Iowa 2002). The biological father lived next door and did not attempt to develop a parental relationship with the child, even though he knew he was the biological father. *Id.* This Court held that the biological father had waived his right to challenge the husband's paternity and that, instead, the husband should continue to be recognized as the child's legal father because he had raised the child for seven years. Moreover, even if a biological father does not waive his right, and brings a timely action to overcome the husband's paternity, a court may

still dismiss the action and preserve the husband's established paternity based on the factors in Iowa Code section 600B.41A.

These principles – protecting the marital family and established parent-child relationships – apply with particular force in the context of children born through assisted reproduction. In that context, it is particularly appropriate and important to conclude that the husband is a legal parent despite his lack of biological connection to the child. When a married couple uses artificial insemination to have a child, the husband will be the child's "established father" by virtue of his marriage to the child's mother. If the sperm donor is anonymous, there is no other man who could seek to disestablish the husband's status as the child's legal father. Moreover, even if a husband sought to disavow paternity in such a case, it is likely that Iowa courts would concur with the courts of other states which *uniformly* have held that a husband who agrees to conceive a child through artificial insemination is estopped from later seeking to disavow his paternity, precisely because of resulting harm to the child. *See, e.g.*, *Brown v. Brown,* 83 Ark. App. 217, 125 S.W.3d 840, 844 (Ct. App. 2003) (husband estopped from denying child support where husband knew wife was using artificial insemination to have child); *People v. Sorensen*, 68 Cal. 2d 280, 283, 437 P.2d 495, 498 (1968); *Levin v. Levin,* 645 N.E.2d 601, 604-05 (Ind. 1994)

(husband who consented orally and in writing to artificial insemination of wife was estopped from denying fatherhood of child); *R.S. v. R.S.*, 9 Kan. App. 2d 39, 44, 670 P.2d 923, 928 (1983) (husband who orally consented to artificial insemination of wife was estopped from denying fatherhood); *Laura G. v. Peter G.*, 15 Misc. 3d 164, 169, 173, 830 N.Y.S.2d 496, 500, 502 (Sup. Ct. 2007) (husband who orally consented to artificial insemination was estopped from denying paternity because he had agreed to artificial insemination, his wife relied on that representation, and he had developed a parent-child relationship with the child); *Brooks v. Fair,* 40 Ohio App.3d 202, 532 N.E.2d 208, 212-13 (Ct. App. 1988) (public policy disallows wife from denying paternity of husband where the parties agreed during marriage to conceive via means of artificial insemination); *In re Baby Doe,* 291 S.C. 389, 353 S.E.2d 877, 878 (1987) (husband is the legal father of a child where he has knowledge of and assists in his wife's efforts to conceive using artificial insemination during marriage).

Even when a married couple uses a known sperm donor to conceive, the spouse who is not biologically-related to the child is established as the child's second legal parent and must be listed on the child's birth certificate as such. Under this Court's holding in *Callender*, a known donor who had agreed to be a donor rather than a parent likely would be deemed to have

waived his parental rights and to lack standing to assert his paternity under Iowa Code section 600B.41A. Moreover, in any event, the parentage of the spouse would not automatically be disestablished based on genetic testing,[6] and the court would have to determine whether to dismiss the paternity challenge and permit the spouse to retain his or her established parentage.

B. Iowa's Marital Presumption Can Readily Be Applied to Female Couples.

Iowa's marital presumption can readily be applied to female couples, as this Court's holding in *Varnum* requires. The presumption of parentage is established by the fact of marriage without any requirement of a biological tie, and a lack of biological tie does not automatically rebut this presumption. The statutes and case law providing that courts should consider the best interests of the child and the existence of a parent-child relationship in determining whether the presumption should be rebutted can easily be applied to same-sex spouses and must be as a matter of equal

[6] The State's concern that a lesbian spouse or the child's mother could disestablish the spouse's parentage at any time, "as [the spouse] would never be the biological parent of the child," (State's brief p. 50), erroneously presumes that the marital presumption can "be rebutted by anyone at any time on the basis of lack of biological connection between the spouse/partner and the child." (State's brief pp. 50-51, internal citations omitted). In fact, as explained above, the Iowa statutes do not permit parentage to be challenged by "anyone at any time," and the absence of a biological connection does not automatically constitute a basis for disestablishing an existing parent-child bond.

protection.

Both the State and Amicus the Family Policy Center appear troubled by the application of the marital presumption law to a same-sex married couple because such couples have not traditionally been recognized as a family unit. (*See* State's brief pp. 33-35 (expressing concern that applying the marital presumption of paternity to a same-sex spouse of the birth mother would distort the Department of Public Health's historical policy in obtaining paternal information for public health programming and research and would contradict traditional "gendered" roles of parents embedded in Iowa's system for registration of births "since its inception")); Family Policy Center's Amicus brief pp. 12-13 (erroneously arguing that adopting Petitioners' interpretation of *Varnum* would result in a "legal revolution" that would ignore an alleged history in Iowa that "always" determined parentage based on biology for purposes of a child's birth certificate)). But, the mere fact that Heather and Melissa Gartner represent a family that was not traditionally accorded legal recognition does not justify a refusal to acknowledge their legal status today. This Court has already held that denying same-sex couples the benefits of marriage merely because of tradition violates Iowa's constitution. *See Varnum*, 763 N.W.2d at 898-901. This Court has recognized that the family unit has changed over time, and

with those changes, the law must adapt to protect even the rights of families who have not traditionally been protected. *See e.g., Callender v. Skiles*, 591 N.W.2d 182, 190 (Iowa 1999) (recognizing that the "traditional makeup of a family" has changed and noting that "[i]f we recognize parenting rights to be fundamental under one set of circumstances, those rights should not necessarily disappear simply because they arise in another set of circumstances involving consenting adults that have not traditionally been embraced").

The State also argues that "in a certain number of cases," applying the marital presumption to married female couples would impose parental obligations on women "who may not have consented to the child's conception." (State's brief p. 50). Plainly, however, the same is true when applying the marital presumption to husbands whose wives conceived children outside of the marriage or through the use of donor insemination without the husband's consent. In such cases where consent to conception is an issue, regardless of the spouse's gender, the spouse must decide whether to seek to disestablish his or her parentage of the child, and the court must apply the same legal framework in the event of such an action.

Placing a same-sex spouse on the birth certificate would not require the Department of Public Health to take any additional administrative

actions or inquire into the method of conception. Rather, the Department of Public Health would simply place the same-sex spouse on the birth certificate as it does for husbands. Iowa law requires the Department of Public Health to place a husband's name on the birth certificate without requiring blood tests or asking whether the husband is the biological father. Iowa Code § 144.13(2) (2012) ("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."). Under the plain language of the statute, only if the husband's established paternity is overcome in a judicial action (or the child is adopted) does Iowa statute allow the birth certificate to be amended to remove the husband from the birth certificate. *Id.*; Iowa Code § 600B.41A (2012). The Department of Public Health simply places the husband's name on the birth certificate without any inquiry into the method of conception. This same simple procedure can be easily applied to same-sex spouses, and as a matter of equal protection, is required.

Additionally, the State's argument that placing a same-sex spouse's name on the birth certificate would prevent them from maintaining accurate public health records of children's biological parentage do not justify withholding the marital presumption from same-sex spouses. (State's brief pp. 32-36). There already are a number of circumstances in which birth certificates do not reflect a child's biological parentage. For example, based on the mandate in Iowa Code section 144.13, the Department of Public Health must place the names of husbands whose children were conceived through donor insemination and other husbands who are not biological fathers on birth certificates. The health history collected about the father in these circumstances is not and cannot be accurate because the father is not biologically-related to the child. Iowa also issues a new birth certificate for an adopted child to reflect the adoptive parents. Iowa Code § 144.23(1) (2012). Treating married same-sex couples the same is simply consistent with current practice. *Varnum* requires that the State provide the same benefits of marriage to Melissa Gartner as it does to any other spouse, including the establishment of her parentage by operation of law under the marital presumption, and the right to be listed as a parent on her child's birth certificate. There are other ways for the State to ensure that they are maintaining accurate health records other than the extreme step of denying

the parentage of married same-sex couples, including, for example, excluding same-sex spouses from this health data.

Although it is true that only a small percentage of husbands are not biological fathers, (State's brief p. 14 (estimating that 95% of husbands whose names are on birth certificates are biological fathers)), the number of Iowa husbands who are not biological fathers is far greater than the number of Iowa same-sex spouses with children. According to the 2010 Census, there were 244,753 opposite-sex married spouses raising their own children in Iowa. U.S. Census Bureau, Profile of General Population and Housing Characteristics: 2010 (Iowa), available at http://factfinder2.census.gov/bkmk/table/1.0/en/DEC/10_DP/DPDP1/0400000US19. Assuming that five percent of these husbands are not biologically-related to their children, 12,237 opposite-sex married parents in Iowa were raising children who were not biologically-related to their fathers. In contrast, there were only 372[7] same-sex married parents in Iowa raising their own children according to the 2010 Census. Gary J. Gates, Abigail M. Cooke, Census Snapshot: Iowa 2010, the Williams Institute (2012),

[7] Because *Varnum* had only recently been decided when these statistics were gathered, this number may be somewhat higher now, but will always be vastly outnumbered by husbands who are not biological fathers.

available at http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot_Iowa_v2.pdf.

III. OTHER STATES WITH SIMILAR LAWS APPLY THE MARITAL PRESUMPTION TO SAME-SEX COUPLES.

A substantial minority of states now recognize marriages or civil unions or comprehensive domestic partnerships with all the rights and responsibilities of marriage for same-sex couples.[8] Several of these states have addressed the parentage of a same-sex spouse of a birth mother, and all have held that the marital presumption of paternity applies to a female spouse and that this presumption is not rebutted by the fact that she is not biologically-related to the child.

In *Della Corte v. Ramirez*, the Massachusetts Court of Appeals held that the birth mother's same-sex spouse was a legal parent of the child born during their marriage under the marital presumption as well as the Massachusetts statute providing that a "husband" who consents to his wife's

[8] Sixteen states and the District of Columbia permit same-sex couples to marry or recognize civil unions or comprehensive domestic partnerships that provide same-sex couples with all the rights and responsibilities of marriage. National Center for Lesbian Rights, *Summary of Laws Regarding Same-Sex Couples* (2012), *available at* http://www.nclrights.org/site/DocServer/Relationship_Recognition_State_Laws_Summary.pdf?docID=6841.

insemination is a father. 961 N.E.2d 601, 602-04 (Mass. Ct. App. 2012) (citing Mass. Gen. Law c. 46, § 4B (2012)). The court explained that under the Massachusetts Supreme Judicial Court case holding that same-sex couples must be allowed to marry, same-sex married spouses must be given all the rights of marriage, including the protections of statutes addressing the paternity of husbands. *Id.* (citing *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003)) ("We do not read 'husband' to exclude same-sex married couples, but determine that same-sex married partners are similarly situated to heterosexual couples in these circumstances.").

In *Miller-Jenkins v. Miller Jenkins*, the Vermont Supreme Court held that the female civil union partner of a birth mother was a legal parent. 180 Vt. 441, 461 (Vt. 2006). Under Vermont law, civil union partners are granted all the rights and responsibilities of marriage. *Id.* The court held that biology does not control the question of whether a spouse or civil union partner is a legal parent, and the lack of biological connection does not rebut the marital presumption. *Id.* The court explained that to hold otherwise "would cause tremendous disruption and uncertainty to some existing families who have conceived via artificial insemination or other means of reproductive technology." *Id.*

In *Debra H. v. Janice R.*, a female same-sex couple living in New York conceived a child through assisted reproduction and entered a civil union in Vermont. 930 N.E.2d 184, 186 (N.Y. 2010). The couple separated a few years later, and the birth mother argued that the non-biological mother was not a parent and could not seek custody or visitation in New York. *Id.* at 186-87. The high court of New York recognized their civil union based on comity and held that she was a parent under the marital presumption under both Vermont and New York law. *Id.* at 195-96.

Like Iowa, the marital presumption statutes in many other states also use gendered terms such as "husband," "man," "father," and "paternity." *See, e.g.*, Del. Code Ann. tit. 13, § 8-204 (2012) ("A man is presumed to be the father of a child if: [] He and the mother of the child are married to each other and the child is born during the marriage"); Cal. Fam. Code § 7611(a) (2012) ("A man is presumed to be the natural father of a child if . . . [h]e and the child's natural mother are or have been married to each other and the child is born during the marriage"); Mass. Gen. Laws Ann. ch. 209C, § 6 (2012) (a man is presumed to be the father of a child . . . if: [] he is or has been married to the mother and the child was born during the marriage); Or. Rev. Stat. Ann. § 109.070 (2012) ("The paternity of a person may be established as follows: [] A man is rebuttably presumed to be the father of a

child born to a woman if he and the woman were married to each other at the time of the child's birth"); Vt. Stat. Ann. tit. 15, § 308 (2012) ("A person alleged to be a parent shall be rebuttably presumed to be the natural parent of a child if . . . the child is born while the husband and wife are legally married to each other"). However, because these states also recognize that same-sex couples may marry or enter other relationships with all the rights and responsibilities of marriage, these marital presumptions must be applied to a female spouse of a birth mother regardless of the statute's use of gendered terms.

Additionally, many other states have recognized that other provisions applying to "paternity" also apply to women who are not birth mothers. *See, e.g., In re S.N.V.*, No. 10CA1302, 2011 WL 6425562 (Colo. App. Dec. 22, 2011), cert. pending (wife of biological father who raised child could be a legal parent under the marital presumption and other paternity provisions); *In re Roberto d.B.*, 923 A.2d 115, 124 (Md. App. 2007) ("the paternity statutes in Maryland must be construed to apply equally to both males and females"); *Elisa B. v. Superior Court*, 117 P.3d 660, 664-65 (Cal. 2005) (same-sex partner of the birth mother was a parent under provision providing that a man who receives the child into his home and holds the child out as his own has a presumption of paternity); *Rubano v. DiCenzo*, 759 A.2d 959,

966-67 (R.I. 2000) (biological mother's same-sex partner had standing to establish "mother and child relationship" under Rhode Island UPA). These states have recognized that statutes use the term "paternity" because maternity is rarely in dispute, but still hold that in the rare cases where maternity is at issue, the same provisions should be applied. *See, e.g.*, *Johnson v. Calvert*, 851 P.2d 776, 789 (Cal. 1993).

IV. BECAUSE MELISSA WAS MARRIED TO HEATHER AT THE TIME OF MACKENZIE'S BIRTH, SHE IS A PARENT AND SHOULD APPEAR ON THE BIRTH CERTIFICATE.

Melissa Gartner and Heather Gartner were married when Heather gave birth to their daughter Mackenzie Jean Gartner. Melissa is an established parent and must be acknowledged as such on the child's birth certificate. *See Varnum*, 763 N.W.2d at 907. Like any other established parent, under *Varnum*, Melissa's established parentage may be overcome only in a judicial action, and in the absence of a contrary court order, she is a legal parent for all purposes. Iowa Code §§ 600B.41A, 598.21E(1)(c) (2012). Recognizing Melissa as a parent on the child's birth certificate would enable Melissa to insure her daughter through her employer's health plan from the moment of birth, consent to any medical care their daughter

might need, and visit her in the hospital—in addition to a panoply of other rights and protections.

CONCLUSION

As this Court has already held, same-sex couples are similarly situated to opposite-sex couples, and cannot be denied the benefits of marriage, including the marital presumption of parentage and other benefits protecting the children of married couples. Iowa law already recognizes that husbands who are not biological fathers can be legal fathers and must be placed on the child's birth certificate without any inquiry into how the child was conceived. These same rules and procedures can and must be applied to same-sex spouses to ensure that they are given "full access to the institution of marriage." *Amici* respectfully urge this Court to hold that the marital presumption applies to a woman who is married to a child's mother and that the Department of Public Health therefore must place Melissa Gartner on the birth certificate of the parties' child.

Respectfully submitted this 21st day of May, 2012.

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May 21, 2012

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