IN THE SUPREME COURT OF IOWA

NO. 12-0243

IOWA DEPARTMENT OF PUBLIC HEALTH

Respondent – Appellant,

vs.

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

Petitioners – Appellees.

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

APPELLANT'S PROOF BRIEF AND REQUEST FOR ORAL ARGUMENT

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I, Heather L. Adams, hereby certify that on the 20th day of April, 2012, that I or a person acting on my behalf did serve Appellant's Proof Brief and Request for Oral Argument on all other parties to this appeal by mailing one (1) copy thereof to the respective counsel for said parties:

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I, Heather L. Adams, hereby certify that I or a person acting on my behalf filed Appellant's Proof Brief and Request for Oral Argument on the 20th day of April, 2012, by delivering one (1) copy thereof to the Clerk of the Iowa Supreme Court, Iowa Judicial Building, 1111E. Court Avenue, Des Moines, Iowa, 50319.

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ROUTING STATEMENT

This appeal should be retained by the Supreme Court under Iowa Rules of Appellate Procedure 6.1101(2)(c) and (d). This case involves substantial issues of first impression and presents fundamental issues of broad public importance regarding the scope and application of the Supreme Court's decision in *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); namely whether *Varnum* requires the Department of Public Health to apply the presumption of paternity statute to enter a female spouse of a birth mother as the father on the child's birth certificate.

STATEMENT OF THE CASE

Nature of the Case: The Iowa Department of Public Health ("Department") seeks appellate review under Iowa Code chapter 17A from a decision of the Iowa District Court for Polk County. The Honorable Eliza J. Ovrom held that the Department violated and erroneously interpreted the presumption of paternity statute in its Vital Records Code by refusing to place the name of a female same-sex spouse on a child's birth certificate as a parent of the child. (Ruling; App.).

Course of Proceedings and Disposition: Petitioner Heather Gartner gave birth to Mackenzie Gartner on September 19, 2009. (Certified Record ("CR), Record Item 1; App.). A certificate of live birth was registered by the State Registrar on September 25, 2009, which lists Heather Gartner as the mother of Mackenzie Gartner. (CR, Record Item 1; App.).

On December 31, 2009, Petitioners sent a letter to the Department "to request issuance of a corrected birth certificate" for Mackenzie Gartner listing Petitioner Melissa Gartner as a second parent on Mackenzie's birth certificate. (CR, Record Item 1; App.). The Department denied Petitioners' request for a new or corrected birth certificate on March 17, 2010. (CR, Record Item 2; App.).

Petitioners initially filed a mandamus action seeking review of the Department's determination in May of 2010. Following various motions and re-filings, the district court dismissed Petitioners' mandamus action on the ground that the Iowa Administrative Procedures Act provides Petitioners with the exclusive means for obtaining review of the Department's determination.[1] Petitioners

1 For a complete procedural history of the case see the Petition for Judicial Review of Agency Action at App. .

filed their Petition for Judicial Review of Agency Action on February 14, 2011. In a Ruling issued January 4, 2012, the district court ordered the Department to issue a birth certificate naming Melissa Gartner as a parent for the child Mackenzie Gartner. (Ruling; App.).

The Department timely filed its Notice of Appeal on February 3, 2012). (Notice of Appeal; App.). The Department further requested a stay of the ruling; the district court denied the stay as to the Petitioners but granted the stay as to "other birth certificates the Department may issue while the appeal of the court's ruling in this case is pending." (Ruling on Respondent's Motion to Stay Proceedings; App.).

STATEMENT OF THE FACTS

The Iowa Vital Statistics Code

The Department of Public Health has long been charged with operating the vital records system in Iowa: in 1880, the eighteenth general assembly enacted a law to generally provide for the collection of vital statistics, by 1904 that law required a certificate of birth to be filed for every child born in Iowa within ten days after the birth and a certificate of death to be filed for each death which occurred in this state before interment of the body. *See* 18th G.A., Chapter 151; 30th

G.A., Chapter 100. Though the manner and methods of registration have evolved over the last century, the goal of the vital records system has remained remarkably consistent: to promote accuracy in the collection and maintenance of records of vital events which occur in this state. *See* 30th G.A., Chapter 100 (1904 law citing the purpose of the vital records system as the "complete" and "accurate" registration of births and deaths); Iowa Code §§ 144.5, 144.38, 144.43 (current law charging the department with protecting the "accuracy," "integrity," and completeness of the vital records system).

The current Iowa Vital Statistics Code, Iowa Code chapter 144, charges the Department with operating a system of vital records and statistics throughout the state of Iowa. The system of vital statistics now includes the registration, maintenance, and certification of records of all vital events which occur in this state, including births, deaths, and marriages. *See* Iowa Code § 144.1(14). On an annual basis, the Department -- with a dedicated staff of under 20 persons -- registers approximately 100,000 events and issues over 85,000 certified copies of vital records. In addition, the Department maintains and provides certified copies for over one hundred years of vital events which have occurred in this state, including over 4.5

million births, 2.6 million deaths, and 2.2 million marriages. (CR, Department's Exhibit B, Affidavit of Jill France, ¶ 3; App.).

One important function of the Department is the maintenance of accurate and thorough statistics of all vital events in Iowa, including births, for purposes of public health programming and research. The Department is statutorily charged with the mission of collecting, preserving, and publishing accurate statistical data derived from vital records. The Department uses this information within the agency for public health surveillance and programming; discloses this data to researchers to be used for studies to prevent morbidity and mortality; and shares this data with other federal and state agencies as necessary to carry out the official duties of such agencies. *See* Iowa Code § 144.1(14), 144.5, 144.12, 144.38, 144.44, 144.45 (Department furnishes data to national division of vital statistics and other federal, state, local, and private agencies for statistical and research purposes); 641 IAC 103.1(2) & 103.1(3)).

Certificates of Birth and the Presumption of Paternity

The Vital Statistics Code requires a certificate of birth to be filed with the Department for every "live birth" which occurs in the state of

Iowa within seven days after the birth.[2] The Vital Statistics Code provides that the certificate of birth shall include the "facts of birth" as certified to by the physician in attendance at the birth or other person authorized by the law. *See* Iowa Code § 144.13. A certificate of birth is a formal and legal compilation of the facts of a birth and establishes a child's identity, age, parentage, and citizenship. *See* Iowa Code § 144.13. (CR, Department's Exhibit A, Official Worksheet to Establish Legal Certificate of Live Birth; App.).

The system for registration of births in Iowa and the Vital Statistics Code has since its inception recognized the biological and gendered roles of "mother" and "father," grounded in the biological "facts of birth" -- that a child has one biological mother and one biological father -- and providing a mechanism for the recording of that information. Specifically, the Vital Statistics Code requires entry of the mother on the birth certificate, and provides by definition that

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2 "Live birth means the complete expulsion or extraction from its mother of a product of human conception, irrespective of the duration of pregnancy, which, after such expulsion or extraction, breathes or shows any other evidence of life[.]" Iowa Code § 144.1(11).

the "mother" of the child is the woman from whom the child is expelled or extracted. Iowa Code § 144.1(11).[3]

With respect to entry of the father of the child on the certificate of birth, the Iowa Code -- like every vital statistics code in the country -- contains a presumption of paternity under which the husband of the birth mother is presumed to be the father of the child for purposes of the child's birth certificate.[4] The Iowa Vital Statistics Code presumption of paternity provides as follows:

> 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.

Iowa Code § 144.13(2) (hereinafter referred to as the "presumption of paternity" statute) (emphasis supplied).

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3 This definition of "mother" is consistent with the definition utilized by every state in the country. "In every state, a self-executing parentage statute identifies the woman who gives birth to a child as that child's legal mother." Byrn and Ives, *Which Came First the Parent or the Child*, 62 Rutgers L. Rev. 305, 318 (Winter 2010).

4 "Every state has a statute presuming that the birth mother's husband is the legal father of the child." Byrn and Ives, *Which Came First the Parent or the Child*, 62 Rutgers L. Rev. 305, 319 (Winter 2010).

The presumption of paternity statute is "founded on the belief that the birth mother's husband is the genetic father,"[5] and indeed this is true in the vast majority of all births to married couples. Specifically, in births to married heterosexual couples operation of the presumption of paternity results in the accurate identification of the biological father on a child's birth certificate in over 95 % of all births.[6] Applying the presumption of paternity to births to lesbian married mothers would result in the accurate identification of the biological father of the child in 0 % of all births.[7] The operation of the Vital Statistics Code's presumption of paternity over the course of the past century has historically resulted in entry of the name of the father of a child on the birth certificate in a manner which is highly accurate, non-intrusive, inexpensive, and which requires no additional court or administrative intervention.

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5 Byrn and Ives, *Which Came First the Parent or the Child*, 62 Rutgers L. Rev. 305, 333 (Winter 2010).

6 Kerymt Anderson, *How Well Does Paternity Confidence Match Actual Paternity?*, 47 Current Anthropology 3 (June 2006).

7 The presumption of paternity reflects reality with respect to an overwhelming majority of those children born of a woman who is married to a man. As to same-sex couples, however, who cannot conceive and bear children without the aid of a third party, the presumption is, in every case, a physical and biological impossibility.
Opinions of the Justices to the Senate, 1201 N.E.2d 565, 577 (Mass. 2004) (Justice Sosman, dissenting).

To further its mission of utilizing vital statistics to promote public health programming and research, the Department gathers a plethora of information from parents of Iowa children from the "Official Worksheet to Establish Legal Certificate of Live Birth (Mother's Worksheet)," completed by every mother who gives birth in this state in order to obtain a birth certificate for her child. (CR, Department's Exhibit A; App.). The Department collects information from the Mother's Worksheet about the mother, including information about the mother's background and her health and activities during the pregnancy.

The Department also gathers information from the Mother's Worksheet about fathers of children born in this state, including the age of the father, the father's level of schooling, the father's race,and the father's primary language, all to utilize for public health programming and research. (CR, Department's Exhibit A, Official Worksheet to Establish Legal Certificate of Live Birth, questions 18 – 25; App. ; CR, Department's Exhibit G, Voluntary Paternity Affidavit; App.). Public health officials and researchers utilize paternity data obtained from the Department's birth records to study a wide range of

important health issues, from congenital and inherited disorders to autism.[8]

Certificates of Birth Where the Presumption of Paternity Does Not Apply

If a mother is not married at the time of the birth of her child, or if a mother indicates that she refuses to provide her legal husband's information because he is not the biological father of the child, the name of the father is not entered on the certificate of birth unless a determination of paternity has been made pursuant to chapter 252A. *See* Iowa Code § 144.13; CR, Department's Exhibit A, question 15b, App. .

The Vital Statistics Code also contains an avenue for intended parents who do not have a gestational or biological connection to a child to be entered as a child's legal parents on the child's birth

8 *See, e.g., Epidemiology of Congenital Idiopathic Talipes Equinovarus in Iowa, 1997 – 2005,* Kancherla V, Romitti PA, Am J Med Genet Part A 152A:1695-1700 (using paternal information from Iowa birth certificates to study prevalence odds of clubfoot); *Paternal Age Influences Down's Syndrome Risk,* J. Urol 2003 June; 169(6):2275-8 (using paternal information from department of health to study risk of Down's Syndrome); *Genetic Heritability and Shared Environmental Factors Among Twin Pairs with Autism,* Arch Gen Psychiatry at Stanford Univ Med Center; published online July 4, 2011 (using paternal information to study risk of autism); *Reproductive Outcomes in Male Childhood Cancer Survivors,* Arch Pediatr Adolesc Med, Vol. 163 (No. 10) October 2009 (using paternal information from birth certificates to study risk of reproductive and infant outcomes of male childhood cancer survivors).

certificate: adoption. *See* Iowa Code § 144.23. The process for issuing a new birth certificate under this factual circumstance is the same regardless of whether the non-biological parents are heterosexual or homosexual: the law requires the rights of the biological parent to be terminated and the rights of the non-biological parent to be established, and then authorizes the non-biological parent to be entered on the child's birth certificate and recognized as a parent of that child. *See* Iowa Code chapters 600 & 600A; Iowa Code § 144.23(1).

Following a legal adoption and receipt of an adoption report or decree the Department issues a new birth certificate for the child, upon which the actual place and date of birth are shown and the name of the new adoptive legal parents are entered as the child's legal parents. *See* Iowa Code §§ 144.23, 144.24. The Department does not require adoptive parents to complete the Mother's Worksheet because their background, demographic information, and their health and activities during the course of the pregnancy are not relevant for public health or research purposes. (CR, Department's Exhibit A; App.).

Certificate of Birth of Mackenzie Gartner

Petitioner Heather Gartner gave birth to Mackenzie Gartner on September 19, 2009. (CR, Record Item 1; App.). A certificate of live birth was registered by the State Registrar on September 25, 2009, which lists Heather Gartner as the mother of Mackenzie Gartner. (CR, Record Item 1; App.).

On December 31, 2009, Petitioners sent a letter to the Department "to request issuance of a corrected birth certificate" for Mackenzie Gartner. (CR, Record Item 1; App.). Petitioners requested that a new birth certificate for Mackenzie Gartner be issued to list Melissa Gartner, the legal spouse of Heather Gartner, as a parent of Mackenzie solely by operation of the presumption of paternity statute. Melissa Gartner has no biological connection to Mackenzie Gartner and did not give birth to Mackenzie Gartner. Petitioners assert that Melissa Gartner has a right to be entered as a legal parent on Mackenzie's birth certificate solely under the self-executing presumption of paternity statute and without otherwise legally establishing parental rights in Melissa or disestablishing legal parental rights in Mackenzie's biological father. (CR, Record Item 1; App. ; Petition for Judicial Review of Agency Action).

Specifically, Petitioners assert that the presumption of paternity statute should be interpreted and applied by the Department as follows:

> 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***~~ spouse shall be entered on the certificate as the ~~***father***~~ parent 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.

(CR, Record Item 1 at p. 3; App. at).

The Department denied Petitioners' request for a new or corrected birth certificate on March 17, 2010. (CR, Record Item 2; App.). The Department relied on the express language of the presumption of paternity statute to find it was not legally authorized to enter Melissa Gartner as the father of Mackenzie Gartner under operation of this presumption and further asserted its application of the express language of the statute is constitutional. The Department indicated its willingness to "issue a new birth certificate listing Melissa Gartner as a parent on Mackenzie Gartner's birth certificate following receipt of an adoption report or decree so indicating." (CR, Record Item 2; App.).

District Court Ruling

The district court found the Department erred in not naming Melissa Gartner as a parent on Mackenzie Gartner's birth certificate pursuant to the presumption of paternity. The court held:

> Pursuant to *Varnum v. Brien*, where a married woman gives birth to a baby conceived through use of an anonymous sperm donor, the Department of Public Health should place her same-sex spouse's name on the child's birth certificate without requiring the spouse to go through an adoption proceeding.

(Ruling at p. 11; App.). The court found as "an important fact of this case" that this child was conceived by use of *in vitro* fertilization. *Id.* The Court declined to reach the constitutional issues raised by the parties and held solely that the Department's application of its presumption of paternity statute was in violation of law and based on an erroneous interpretation of the law. (Ruling at pp. 11 – 12; App.).

ARGUMENT

Summary of argument: The sole question this case presents is whether a female spouse of a birth mother should be legally presumed to be a child's biological father for purposes of the child's birth certificate. The Department asserts that it complied with the clear and unambiguous language of the presumption of paternity

statute in refusing to list a woman's female spouse as the child's father on the birth certificate; and that it neither violated nor erroneously interpreted such law in so doing.

This case raises no issues regarding whether lesbian couples should parent: thousands in this state do and the Department's position lodges no challenge to those established relationships. This case further raises no issues with respect to whether two lesbians or two gay men should be entered as legal parents on a child's birth certificate: the Department has historically, in compliance with the Vital Statistics Code, entered the names of non-birthing lesbians and gay men as parents of a child on such child's birth certificate following receipt of an adoption order recognizing such individuals as legal parents.[9] Here, the Department would in fact promptly grant Petitioners a new birth certificate recognizing Melissa Gartner as a legal parent following her adoption of Mackenzie Gartner.

Rather, the sole issue in this case is whether a female spouse of a birth mother has the legal right to be listed as the father of the child

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9 As the district court properly noted: "Of course the present action does not raise the issue of same-sex parenting...The present action is merely about what steps must be taken to place Melissa's name on the child's birth certificate – i.e. whether she will have to first adopt the child." (Ruling at p. 9; App.).

on that child's birth certificate solely by operation of the presumption of paternity statute and without following Iowa's adoption laws: the Department asserts that she does not.

I. THE DEPARTMENT REASONABLY APPLIED THE PRESUMPTION OF PATERNITY STATUTE TO REFUSE TO LIST A FEMALE SPOUSE OF A BIRTH MOTHER AS THE FATHER OF THE CHILD ON THE CHILD'S BIRTH CERTIFICATE.

Standard of Review: Judicial review of final agency action under Iowa Code chapter 17A is for corrections of errors at law. *See Houck v. Iowa Bd. of Pharmacy Exam'rs*, 752 N.W.2d 14, 16 (Iowa 2008). Iowa Code section 17A.19(10) sets forth the standards under which the Court is to review the Department's determination in this matter. *Auen v. Alcoholic Beverages Div.*, 679 N.W.2d 586, 589 (Iowa 2004). Ultimately, "[t]he burden of demonstrating the required prejudice and the invalidity of agency action is on the party asserting invalidity." Iowa Code § 17A.19(8)(a).

The district court found the Department's actions to be "in violation of law" and "based on an erroneous interpretation of the law" in contravention of Iowa Code sections 17A.19(10)(b) and (c). (Ruling at 11 – 12; App.). Section 17A.19(10)(b) section specifically

authorizes review of agency action which is "in violation of any provision of law." Section 17A.19(10)(c) provides relief from agency action which is "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." The term "provision of law" is defined to include "the whole or part of the Constitution of the United States of America or the Constitution of the State of Iowa, or of any federal or state statute, court rule, executive order of the governor, or agency rule." Iowa Code § 17A.2(10). The term "provision of law" does not include decisional or common law; thus the sole question on appeal is whether the Department violated or erroneously interpreted its presumption of paternity statute at Iowa Code section 144.13(2). (Ruling at p. 4; App.).

Preservation of Error: The question of whether the Department's application of the presumption of paternity statute constituted a violation or an erroneous interpretation of such law was raised before and decided by the district court; this question is therefore preserved for appellate review. *Benavides v. J. C. Penney Life Ins. Co.*, 539 N.W.2d 352, 356 (Iowa 1995).

Argument:

A. The Terms of the Presumption of Paternity Statute Are Clear and Unambiguous and Therefore the Department's Application of Those Very Terms Was Not Erroneous

The Department's presumption of paternity statute provides as follows:

> 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.

Iowa Code § 144.13(2) (emphasis supplied). Petitioners asserted, and the district court found, that the Department violated this section by failing to interpret or construe the term "husband" to mean "spouse" and the term "father" to mean "parent." However, because the actual terms of this statute are clear and unambiguous, the Department acted properly in applying the statute as written.

Where the face of a statute is clear and unambiguous, statutory interpretation or construction is not necessary and the agency should apply the statute as written. *Voss v. Iowa Dep't of Transportation*, 621 N.W.2d 208, 211 (Iowa 2001) ("if the statutory language is plain

and the meaning is clear...do not search for legislative intent beyond the express terms of the statute"). Courts and agencies are called to apply principles of statutory construction only if a statute is ambiguous: ambiguity exists only "if reasonable minds may differ or may be uncertain as to the meaning of the statute." *Id.*

Here, there is no ambiguity in the terms "husband," "father," or "paternity": "Husband" is commonly understood and widely used to denote a married man; "father" is a term which is consistently used and uniformly understood to mean a male parent; "paternity" routinely describes the process of determining male parentage.[10] These terms are utilized in this identical fashion in chapter 144: "father" is defined as the male parent of a child and "paternity" is consistently referred to as determining the father of a child. *See* Iowa Code §§ 144.12A(1)(c); 144.13; 144.40.

Indeed, a review of the entire Iowa Code enforces the position that these terms are used and defined consistently in Iowa law and

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10 "Husband" means "a married man;" "father" means "a male parent;" "paternity" means "the fact or condition of being a father." American Heritage Dictionary, 2nd College Edition, 628, 492, 909 (1985); *see also* § 4.1(38) (words and phrases shall be construed according to "the approved usage of the language") and *Thompson v. Kaczinski*, 774 N.W.2d 829, 833 (Iowa 2009) (courts "generally presume words contained in a statute are used in their ordinary and usual sense with the meaning commonly attributed to them").

that there is no ambiguity in the Iowa Code as to the meaning of these terms or this statute. Specifically, the term "paternity" is used over ninety times in the Iowa Code and each and every citation refers to establishing the male, biological parent of a child.[11] Likewise, there can be no uncertainty as to the meaning of this statute: its intent is expressly to provide a mechanism for the determination of paternity on a certificate of birth -- to provide by operation of law for the entry of the name of a woman's husband on the birth certificate as the father of the child at issue.

The purpose of this statute is clearly and without ambiguity to establish, as the statute says, a presumption of "paternity" or

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11 *See, e.g.* Iowa Code § 144.12A (paternity registry established to record the name and other identifying information of the man who is the "biological father" of a child); § 252A.3A (establishing process for filing of paternity affidavit to establish the "biological father" of a child); chapter 252B (child support recovery references to paternity of a child as the male parent); chapter 252F (administrative establishment of paternity process established to determine the "biological father of a child"); § 598.21E (establishes a process for contesting paternity to challenge child support order for determination of a "child's biological father"); chapter 600A (termination of parental rights chapter governing the parental rights of "biological parents" including the "paternity" of the child as the child's "biological father"); chapter 600B (chapter outlines obligations of fathers and proceedings to establish paternity to compel support for the child from the "biological father"); § 633.222 (refers to "paternity" as a child's "biological father" and provides that unless a child has been adopted, a biological child inherits from the child's biological father).

biological fatherhood of a child for purposes of the child's birth certificate. Because the statutory language is plain and clear, statutory construction as undertaken by the district court – specifically interpreting "husband" to mean "spouse" and "father" to mean "parent" -- is unnecessary and unauthorized. *State v. Albrecht*, 657 N.W.2d 474, 479 (Iowa 2003) (resort to statutory construction "only when the explicit terms of a statute are ambiguous"). In fact, to adopt the construction of this statute proposed by Petitioners would be to introduce ambiguity into a statutory scheme where none exists – to interpret the term "father" as "parent" in chapter 144 and the many other chapters referenced above creates confusion about parentage in a manner which could have significant repercussions for children and parents in this state.

Many law review articles cited by the Department and the Petitioners in this matter advocate for reform in state statutes related to the determination of parentage in same-sex couple families,[12] and indeed a few states have amended their vital statistics codes to

12 *See, e.g.*, Byrn and Ives, *Which Came First the Parent or the Child*, 62 Rutgers L. Rev. 305 (Winter 2010); Susan Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 Boston L. Rev. 227 (April 2006); Nancy Polikoff, *A Mother Should Not Have to Adopt Her Own*

expressly recognize the lesbian spouses of birth mothers on birth certificates, especially in those circumstances in which the child is conceived using assisted reproductive technology.[13]

The issue of whether Iowa should follow suit, while a worthy and weighty question, is ultimately a policy decision to be made by the General Assembly. *See* Iowa R. App. P. 6.904(3)(m) ("In construing statutes, the court searches for the legislative intent as shown by what the legislature said, rather than what it should or might have said").

The question on judicial review under this section of Chapter 17A is not what potential legislative enactment would be most fair or reasonable; it is whether the presumption of paternity statute as it currently exists has been applied by the Department in a manner that is consistent with the terms of the statute.

In sum, the Department did not violate the presumption of paternity statute in determining that the statute should be applied as

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Child, 5 Stanford J. Civ. Rts & Civ. Liberties 201 (Oct. 2009).

13 For example, the District of Columbia has provided by statute that in cases of artificial insemination a lesbian partner's name is entered on the birth certificate provided the partner signs a written consent to the insemination expressing the intent to parent. D.C. Code § 7-205(e)(3) (2009).

it reads on its face and not as interpreted or construed by Petitioners and the district court. The purpose of the statute is to provide a mechanism for the presumption of paternity, or fatherhood, on a child's birth certificate. It is a biological and admitted fact that a woman's female spouse can never be the biological father ofthe woman's child. (CR, Petitioners' Response to Respondent's First Set of Requests for Admissions, Responses 1 & 2; App.). In other words, it is a biological impossibility for a woman to ever establish paternity of a child. Because a woman can never be the male, biological father of a child -- can never legally establish paternity -- it is reasonable for the Department to refuse to apply a legal presumption of paternity in favor of a female spouse.

B. The Presumptions Contained in Chapters 252A and 598 Do Not Control the Department's Application of the Presumption of Paternity Statute Contained in Chapter 144

The district court relied on the language of two other Iowa statutes in finding that the Department violated its presumption of paternity statute. (Ruling at pp. 7 – 8; App.). Because these statutes are in separate chapters of the Iowa Code, are administered for

distinct purposes, and contain distinguishing language, the district court gave improper weight to the provisions of these laws.

i. Other Presumption Statutes Are Administered for Distinct Purposes

Chapter 252A contains the "Support of Dependents Law," the purpose of which is "to secure support in civil proceedings for dependent spouses, children and poor relatives from persons legally responsible for their support." Iowa Code § 252A.1. The specific provisions of Chapter 252A cited by the district court relate to liability for the financial support of children.[14] However, Petitioners are not in this action attempting to secure financial support for a child under this chapter, and there are no provisions of Chapter 252A which govern the Department's issuance of certificates of birth-- the action at issue in this matter.

The district court's reliance on Iowa Code chapter 598 is equally misplaced. Chapter 598 is Iowa's Dissolution of Marriage law and the

14 "A 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 the marriage." Iowa Code § 252A.3.

section cited by the district court is applicable in a dissolution of marriage action brought pursuant to this chapter.[15] The district court has jurisdiction of the subject matter of chapter 598 and the Department of Public Health possesses no legal authority to reach determinations regarding dissolutions of marriage or custody of children. *See* Iowa Code § 598.2

The district court found that the Department's presumption of paternity should be interpreted in the context of these two other presumption statutes because all three laws govern the "status of children born during a marriage." (Ruling at p. 7; App. at). However, the district court did not give proper weight to the distinct purpose served by these other statutes, which exist primarily to ensure that a child receive financial support from two parents. The Department is statutorily charged with a different mission: identifying and collecting accurate information from a child's two biological parents. This mission fuels two interests that are unique to the Department of Public Health: (1) obtaining accurate medical and biographical

15 "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." Iowa Code § 598.31.

information from a child's biological mother and father to utilize for public health programs and research; and (2) maintaining accurate records of the parentage of children for vital statistics records.

Department's Interest in Obtaining Paternal Information for Public Health Programming and Research.

The first unique interest of the Department relates to its statutory charge to collect, preserve, and publish accurate statistical data derived from vital records for public health surveillance and programming and research.[16] Specifically with respect to paternity, the Department seeks to gather data and information from biological fathers of children born in this state -- including the age of the father, the father's level of schooling, the father's race, and the father's primary language.[17] Public health officials and researchers specifically utilize paternity data obtained from the Department's

16 Iowa Code § 144.1(14), 144.5, 144.12, 144.38, 144.45 (Department furnishes data to national division of vital statistics and other federal, state, local, and private agencies for statistical and research purposes); 641 IAC 103.1(2) & 103.1(3); *see also In re Michaela Lee R*, 756 A.2d 214, 233 (Conn. 2000) (vital records data used for a variety of governmental purposes, including to assist "the state in planning a number of public health programs").

17 The Department gathers this data from the Mother's Worksheet, completed by every mother who gives birth in this state in order to obtain a birth certificate for her child, and from voluntary paternity affidavits. (CR, Department's Exhibit A, questions 18 - 25; App. ; CR, Department's Exhibit G, Voluntary Paternity Affidavit; App.).

birth records to study a wide range of important health issues, from congenital and inherited disorders to autism.[18]

Under Petitioner's application of the presumption of paternity statute, a lesbian spouse of the birth mother would be construed to be the father, and her data and information would be transmitted to and maintained by the Department as if she were the biological father of the child. This statistical information would then be included in the aggregate statistical information gathered and published by the Department and shared with researchers and other public health officials.

If a lesbian spouse is construed to be the biological father for purposes of the certificate of birth, the Department will inevitably collect and publish information about biological fathers that is

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18 See, e.g., *Epidemiology of Congenital Idiopathic Talipes Equinovarus in Iowa, 1997 – 2005*, Kancherla V, Romitti PA, Am J Med Genet Part A 152A:1695-1700 (using paternal information from Iowa birth certificates to study prevalence odds of clubfoot); *Paternal Age Influences Down's Syndrome Risk*, J. Urol 2003 June; 169(6):2275-8 (using paternal information from department of health to study risk of Down's Syndrome); *Genetic Heritability and Shared Environmental Factors Among Twin Pairs with Autism*, Arch Gen Psychiatry at Stanford Univ Med Center; published online July 4, 2011 (using paternal information to study risk of autism); *Reproductive Outcomes in Male Childhood Cancer Survivors*, Arch Pediatr Adolesc Med, Vol. 163 (No. 10) October 2009 (using paternal information from birth certificates to study risk of reproductive and infant outcomes of male childhood cancer survivors).

inaccurate. This may result in skewed and unreliable data in areas which have far-reaching impact on the public's health and on public policy. For example:

> * Gathering information about a biological father's race allows public health officials and researchers to correlate conditions like sickle cell anemia and race;
>
> * Collecting information about a biological father's age allows meaningful study of the connection between paternal age and autism or other conditions and disorders;
>
> * Maintaining data regarding the paternity of Iowa's children enables policy makers to properly examine important social issues and to craft policies in these areas.

(CR, Department's Exhibit B, Affidavit of Jill France, ¶ 9; App. at ; *see also* the studies cited in footnote 18). The Department's unique role in enabling important public health surveillance and research is undermined by applying the presumption of paternity to record a woman as the father of a child.

Department's Interest in Maintaining Accurate Vital Records

The overarching purpose of the Vital Statistics Code at Iowa Code chapter 144 is to ensure that vital records – including certificates of birth, death, and marriage – are accurate as to the event at issue. The Vital Statistics Code is designed to ensure accurate and timely registration, collection, preservation, and certification of vital

records of births, deaths, and marriages, and there can be no question that this is a unique and important governmental function.[19]

A certificate of birth is a formal and legal compilation of the facts of a birth and establishes a child's identity, age, parentage, and citizenship. *See* Iowa Code § 144.13; CR, Department's Exhibit A, Official Worksheet to Establish Legal Certificate of Live Birth; App. . The system for registration of births in Iowa has since its inception recognized the biological and "gendered" roles of "mother" and "father," grounded in the biological fact that a child has one biological mother and one biological father and providing a mechanism for the recording of that information. Iowa's Vital Statistics Code is replete with the "gendered" terms "mother" and "father": the terms are utilized a collective 23 times in this chapter alone. Indeed there are over one hundred references in the Iowa Code to "mother" and

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19 Iowa Code §§ 144.1, 144.38, 144.43, 144.52; *see also In re Michaela Lee*, 756 A.2d 214, 233 (Conn. 2000) (state has substantial interest in maintaining accurate vital records); *Robertson v. Pfister*, 523 So.2d 678, 679 (D.Ct. Fla 1988) (state has interest in ensuring accuracy and reliability of its vital statistics); *In re T.J.S.*, 16 A.3d 386 (N.J. Sup. Ct. 2011) (state registrar has an interest in the accurate registration of all relevant statistics related to a birth); *U.S. Vital Statistics System*, U.S. Dept. of Health and Human Services, Centers for Disease Control and Prevention (Feb. 1997).

"father" in various statutes which expressly recognize the biological reality that women and men each play a distinct but equally necessary role in human reproduction and have corresponding rights, duties and obligations to their child in the absence of a termination of those rights.[20]

A birth record which accurately reflects a child's parents is important both to the child and his or her parents and to the Iowa Department of Public Health as the custodian of vital statistics. Because of the unique interests of the Department of Public Health in applying its presumption of paternity statute, such law should not be read in the context of other presumption statutes but should be applied as written.

ii. Other Presumption Statutes Contain Distinguishing Language

However, even if the Department's presumption of paternity statute is construed in the context of these other presumption

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20 *See* Iowa Code chapter 252A (support of dependents); chapter 252F (administrative establishment of paternity); chapter 600 (adoption); § 600A.1 ("the best interest of a child requires that each biological parent affirmatively assume the duties encompassed by the role of being a parent"); chapter 600A (termination of parental rights); chapter 600B (paternity and obligation for support); § 633.221 (biological child inherits from biological mother unless child has been adopted); § 633.222 (biological child inherits from biological father unless child has been adopted).

statutes, the distinct language used by the legislature in these three statutes only further bolsters the Department's claim that it properly interpreted chapter 144. Chapter 252A and 598 both contain gender-neutral language and provide that a child born of parents who are married shall be deemed the legitimate child of both parents. *See* 252A.3, 598.31. Neither of these statutes uses the terms "husband," "father," or "paternity." The legislatures express use of gender-specific terms in chapter 144 -- and not in either chapter 252A or 598 -- evidences an intent that supports the Department's application in this matter. *See Farmers Cooperative Co. v. DeCoster*, 528 N.W.2d 536, 539 (Iowa 1995) ("where a statute with respect to one subject contains a given provision, the omission of such provision from a similar statute is significant to show a different intention existed").

Additionally, the term used in section 144.13(2) is *paternity*, while the term used in both sections 252A.3(4) and 598.31 is *legitimacy*. "Paternity and legitimacy are different concepts. Legitimacy means being born to legally married parents, while paternity recognizes that only one person can be the biological father of a child." *Callahan v. Dep't of Revenue ex rel. Roberts*, 800 So.2d

679, 683 (Fla. Dist. Ct. App. 2001) (Cobb,J., concurring specially); *see also Daniel v. Daniel*, 695 So.2d 1253, 1254 (Fla. 1997); ("paternity and legitimacy are related, but nevertheless separate and distinct concepts"); *Bonsu v. Holder*, 646 F.Supp.2d. 273, 281 (D. Conn. 2009) ("paternity and legitimacy are distinct legal concepts"). The fact that the term legitimacy is not used in the presumption of paternity statute in section 144.13(2) further supports an independent and distinct construction of these statutes. *See Farmers Cooperative Co.*, 528 N.W.2d at 539.

C. Varnum Should Not Be Expansively Interpreted To Require the Department To Place the Name of a Female Spouse on a Birth Certificate Pursuant to the Presumption of Paternity

The district court rested its ruling on the Supreme Court's decision in *Varnum*, holding that the outcome of the case at bar is dictated by the *Varnum* decision. (Ruling at p. 11; App.). The Department asserts that *Varnum* does not dictate the outcome in this matter for several reasons and that applying *Varnum* in the manner proposed by the district court constitutes an improper expansion of this decision.

i. Varnum does not expressly impact the presumption of paternity.

The Department's presumption of paternity statute is never cited in *Varnum*; there is simply no mention of Iowa Code section 144.13 in the comprehensive decision which does include references to over fifty different specific Iowa Code provisions. *Varnum's* holding expressly affects Iowa's civil marriage statute in chapter 595, holding such statute unconstitutional under an equal protection analysis and ordering as follows: "The language in Iowa Code section 595.2 limiting civil marriage to a man and a woman must be stricken from the statute, and 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 v. Brien*, 763 N.W.2d 862, 907 (Iowa 2009). *Varnum* expressly strikes language in chapter 595 affecting access to marriage by gays and lesbians; the decision does not contain any reference to the vital records presumption in chapter 144.

Thus while *Varnum* directed the state registrar to amend the process for issuance of marriage certificates and licenses to allow gay and lesbian persons to fully access marriage, which the Department

has done, the decision did not expressly address the issuance of birth certificates of children born to married lesbian women or to surrogates on behalf of gay spouses. Hence, the *Varnum* decision did not specifically impact or alter the presumption of paternity language contained in Iowa Code section 144.13, nor did it expressly strike any provisions in the vital records statute or require that such statute be applied in a gender neutral manner.

The district court was not authorized to modify the clear and unambiguous statutory language of section 144.13(2) absent either an express holding in *Varnum* addressing this statutory language—which does not exist – or an independent constitutional analysis of the presumption of paternity statute – which the district court avoided. The district court erred in essentially re-writing the presumption statute absent a *Varnum* mandate or a constitutional analysis and the court's decision should therefore be reversed.

ii. *Varnum's* citation to another presumption statute does not dictate the Department's statute be applied to same-sex couples.

The district court gave significant weight to the citation in *Varnum* to chapter 252A's presumption of legitimacy, stating:

> The Supreme Court in *Varnum* cited legitimacy of children born to married parents under Section 252A.3(4) as one of the benefits that was withheld from same-sex couples who could not legally be married. *Varnum v. Brien*, 763 N.w.2d at 903, n. 28.

(Ruling at p. 8; App.). The Department first asserts that the Supreme Court in *Varnum did not* specifically cite the legitimacy of children born to married parents as an improper withholding of a marriage benefit. Rather, the citation in *Varnum* to chapter 252A's legitimacy provision is contained in a footnote which lists a variety of code sections and begins: *"Plaintiffs identify* over two-hundred Iowa statutes affected by civil-marriage status." *Varnum*, 763 N.w.2d at 903, n. 28 (emphasis supplied). Additionally, this footnote is part of a broader discussion of the Court's review of the governmental objectives set forth by the County to support the same-sex marriage ban. Hence while this footnote does catalog a number of different code provisions which the Plaintiffs cited in reference to marriage benefits, this footnote does not constitute a holding by the Supreme Court that the presumption of paternity in chapter 144 is a marriage benefit which must be applied to same-sex couples.

Additionally, for the reasons cited above, the presumption of legitimacy statute in chapter 252A contains different language from

the Department's presumption of paternity statute and is administered for a distinct purpose, and thus even if it chapter 252A was cited by the Court in *Varnum* as a marriage benefit such citation would not dictate the application of chapter 144's presumption of paternity.

iii. Allowing "full access to the institution of marriage" does not require the Department to presume a female fathered a child.

Varnum requires interpretation of the Iowa Code in a manner which allows gay and lesbian people "full access to the institution of civil marriage." *Varnum*, 763 N.W.2d at 907. As the Court notes in *Varnum*, "marriage is a civil contract" between two consenting parties. Iowa Code § 595.1A, *Varnum*, 763 N.W.2d. at 905. Statutes which impact these two consenting parties clearly must afford gays and lesbians full access to the rights and duties imposed or inferred by such statute. *Varnum*, 764 N.W.2d at 907. However, it is improper to expand *Varnum* to attack statutes which 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.

In other words, where a statute defines an individual solely in the context of the marital relationship – using terms such as "husband" and "wife" -- those statutes without question must be applied to homosexuals and heterosexuals married couples alike. However, where a statute such as the presumption of paternity defines an individual in the context of his or her relationship to a party outside the marriage contract – using terms such as "mother" and "father" – the Department asserts that it is not erroneous to continue to apply such statutes as written and that *Varnum* should not be expansively interpreted to require modifications of these laws.

The presumption of paternity is a legal mechanism which authorizes the Department to presume a woman's husband fathered her child for the purposes of the child's birth record. Applying the presumption of paternity in the manner held by the district court equates to presuming for legal purposes that a woman fathered a child. Does *Varnum* require the Department to presume something which is factually impossible, does it dictate that the agency must adopt policies based on fictional constructs? The Department asserts that it does not; and that the agency's interpretation of this statute was therefore not erroneous.

D. The Integrity and Stability of Same-Sex Families Is Not Promoted By Application of the Presumption of Paternity to These Families

At the foundation of the district court's ruling is its belief that applying the presumption of paternity to same-sex couples promotes the integrity and stability of these families.[21] While the goal of promoting the integrity of all families and protecting the financial wellbeing of all children is without question a worthy one, applying the presumption of paternity to same-sex couples actually thwarts instead of furthers such goals.

Applying the presumption of paternity statute to place a non-birthing same-sex spouse on a birth certificate in lieu of proceeding with a legal adoption threatens the child, the non-birthing spouse, and the family, for two reasons: (1) the majority of states will not legally recognize a parent-child relationship established in this

21 The district court ruling makes reference to the presumption of paternity "promoting" and "preserving" the "integrity of the family" four separate times in just two pages of its decision. (Ruling at p. 10 - 11; App.).

manner; (2) the parent-child relationship would be legally tenuous even in Iowa.

i. The parent-child relationship established by the district court would not be legally recognized in the majority of states.

The majority of U.S. States, and all of Iowa's sister states with the exception of Illinois, have passed laws prohibiting same-sex marriage.[22] While each of those states would recognize a parent-child relationship created through an adoption decree, *none* of these states would likely recognize a parent-child relationship created through application of the presumption of paternity to same-sex couples.[23]

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22 *Varnum*, 763 N.w.2d at 878, footnote 5; *see e.g.*, Minn. Stat. Ann. § 517.03 (a marriage between persons of the same sex is prohibited, and "a marriage entered into by persons of the same sex, either under common law or statute, that is recognized by another state or foreign jurisdiction is void in this state and contractual rights granted by virtue of the marriage or its termination are unenforceable in this state); Missouri Const., art. I, § 33 (a marriage shall exist only between a man and a woman); South Dakota Const., art. 21, § 9 (same); Wisconsin Const., art. 13, § 13 (same).

23 Linda Anderson, *Protecting Parent-Child Relationships: Determining Parental Rights of Same-Sex Parents Consistently Despite Varying Recognition of their Relationship*, 5 Pierce Law Review 1 (2006); Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same Sex Couples Era*, 86 Boston Law Review 227, 290 (April 2006) (While other states give full faith and credit to adoption decrees, those who rely on a default rule like the presumption of paternity to assert legal parentage remain "vulnerable to challenge" in other jurisdictions); Mark Strasser, *When Is a Parent Not a Parent?*, 23 Cardozo L. Rev. 299, 323 (2001) (advising non-birthing lesbian spouses to adopt due to the recognition given adoption by other states under the full faith and credit clause, concluding that an adoption "would be a wise investment for their own sakes and, even more importantly, for the sake of their child."); Massachusetts Law Practice Manual, Volume II, Chapter 27, *Same Sex*

For this reason, legal scholars and attorneys routinely and consistently advise that non-birthing lesbian spouses who desire to become a legal parent to a child legally adopt such child to establish parental rights.[24]

In light of the variability with which same sex marriages are recognized in other states, and the fact that parenting rights created based on such marriage would be subject to challenge in many other jurisdictions, application of the presumption of paternity in Iowa

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Marriage, Divorce, and Estate Planning Issues § 27.2 (2008) ("All couples should proceed with coparent adoptions regardless of the fact that their names appear on a birth certificate. ...The lack of federal recognition and the uncertainty of recognition under the laws of sister states make it crucial that same-sex married couples pursue coparent adoptions").

24 Every law review article and family law treatise on this topic reviewed by the undersigned recommends that a non-birthing lesbian spouse should legally adopt in order to secure parental rights. *See, e.g.* Nancy Polikoff, *A Mother Should Not Have to Adopt Her Own Child*, 5 Stanford J. Civ. Rts & Civ. Liberties 201, 217, 259 (Oct. 2009) (professor of law notes that legal commentators and "lawyers in the states that do have parental presumption for couples who marry...urge their clients to nonetheless complete a second-parent adoption or obtain an order of parentage"). Counsel for Petitioners at Lambda Legal also recognize that adoption is advisable for these families and that simply relying on the presumption of paternity to establish legal parentage does not adequately protect the integrity and stability of these families, stating at oral submission to the district court: "And to be sure, we at Lambda Legal also advise families to perform second parent adoptions even when they are married, but solely because they may travel outside of the state." (Transcript, p. 12 l. 5 – 8; App. at).

would not firmly establish such rights for those families who travel or reside outside of the state of Iowa. For the Court to order that non-birthing spouses of lesbians must be entered as second parents on the birth certificate without an adoption places a child at risk whenever the child or his or her parents step across state lines, particularly when Iowa is an island for recognition of same-sex marriage in a sea of states with various constitutional and statutory bans against recognizing homosexuals right to marry.[25]

Additionally, at the federal level, the Defense of Marriage Act (DOMA) provides that states may refuse to recognize a same-sex marriage performed in another jurisdiction.[26] It is without dispute that DOMA has an "ironic and devastating effect on the integrity and portability of legal relationships" between gay and lesbian parents and

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25 Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same Sex Couples Era*, 86 Boston Law Review 227, 290 (April 2006) (While other states give full faith and credit to adoption decrees, those who rely on a default rule like the presumption of paternity to assert legal parentage remain "vulnerable to challenge" in other jurisdictions); Mark Strasser, *When Is a Parent Not a Parent?*, 23 Cardozo L. Rev. 299, 315 (2001) (discussing risks to homosexual couples that another state will refuse to recognize the presumption of parentage and advocating adoption to avoid "a situation beset with uncertainty and insecurity").

26 Defense of Marriage Act, Pub. L. 104-199, 1 U.S.C. § 7, 28 U.S.C. § 1738C (1996) ("No state...shall be required to give effect to any public act, record, or judicial proceeding of any other state...respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State...*or a right or claim arising from such relationship*) (emphasis supplied).

their intended children.[27] In fact, because of DOMA and the thirty states which have passed similar legislation at the state level, relying on the presumption of paternity to establish parentage places a child at significantly greater risk than proceeding with a legal adoption. *Id.*

As the district court noted – applying the presumption of paternity traditionally promotes the integrity and stability of families, and this is so because every state in the country and the federal government recognizes parental rights of fathers created in reliance on the presumption. The same rationale simply does not hold when applied to same-sex couples, however, as the majority of states and the federal government would not recognize parental rights of same-sex spouses created in this manner. The Petitioners' quest to apply the presumption to same-sex spouses on the ground that it would create legal stability for these families is at direct odds with their acknowledgment that these spouses should pursue adoptions to

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27 Rhonda Wasserman, *DOMA and the Happy Family: A Lesson in Irony*, 41 Cal. W. Int'l L. J. 275, 298, 302 (2010) (symposium concluding: "Ironically then, DOMA – which was designed to protect marriage as a means of protecting children – appears to provide children with less protection if their parents marry and rely on the marital presumption of parentage" than if they adopt or rely on other judicial orders of parentage. "The couple's willingness to commit to one another in marriage, which in the heterosexual context is celebrated as a means of providing greater security for children, ironically has the opposite effect when the parents are gay or lesbian.").

secure their legal rights.[28] To apply the presumption of paternity in the manner proposed by the Petitioners places these families at substantial legal risk and erodes the stability of these families.

ii. The parent-child relationship created by the district court ruling would be legally tenuous even in Iowa.

Iowa law provides that "paternity which is legally established may be overcome...if subsequent blood or genetic testing indicates that the previously established father of a child is not the biological father of the child." Iowa Code Section 600B.41A.[29] This statute and Iowa case law authorize the non-birthing spouse, the mother, and the biological father to challenge paternity at any time prior to the child turning eighteen, thus creating a situation in which the family unit is always at risk of challenge.

First, under the district court's application of the presumption of paternity a non-birthing lesbian spouse would be entered by

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28 Counsel for Petitioners at Lambda Legal stated at oral submission to the district court: "And to be sure, we at Lambda Legal also advise families to perform second parent adoptions even when they are married, but solely because they may travel outside of the state." (Transcript, p. 12 l, lines 5 – 8; App.).

29 If the presumption of paternity was applied to establish paternity in a same-sex spouse, the establishment of such paternity would be expressly subject to challenge under this code section: Section 600B.41A "applies to the overcoming of paternity which has been established...by operation of law when the established father and the mother of the child are or were married to each other[.]"

operation of law as a legal parent of a child. In all cases, this spouse would be legally responsible within the state of Iowa for a child to whom they have no biological connection; in a certain number of cases such spouse may not have consented to the child's conception, to which they were not a party. "Unlike heterosexual couples, who are presumed to consent to co-parenting by having marital sex, spouses in same-sex marriages [would] be able to impose parental obligations on their spouse without any expression of consent on their part at all."[30] In other words, "if a state statute deems a person to be a legal parent, she is 'obligated' to be the child's legal parent, regardless of her desire to take on that responsibility."[31]

A certain percentage of these spouses can be expected to challenge the paternity of the child; 100 % of those lesbian spouses would be successful in such challenge as they would never be the biological father of the child. As noted in the Stanford Journal of Civil Rights: If the presumption of paternity can "be rebutted by anyone at any time on the basis of lack of biological connection between the

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30 Maggie Gallagher, *Federal Marriage Amendment: Yes or No?*, 2 University of Saint Thomas Law Journal 33, 57 (2004) (The issue of whether a woman has consented to parenthood is "particularly acute in a system which elevates decisions about whether or not to have children into a constitutional right.")

spouse/partner and the child, then the presumption would be meaningless for a lesbian couple. A non-biological mother would always be able to disestablish her parentage and thereby end her support obligation, and a biological mother would always be able to disestablish her partner's parentage."[32]

Likewise, under the district court's application of the presumption of paternity – in which the lesbian spouse is listed as the parent by operation of law without terminating the biological father's fundamental parental rights – the biological father could always challenge paternity of the child. *Callender v. Skiles*, 591 N.W.2d 182 (Iowa 1999). While in this case Heather Gartner was inseminated with the sperm of an anonymous donor who presumably signed away his legal rights to this child, clearly not all lesbians desiring to become pregnant chose to do so via this relatively intrusive and expensive method; some become impregnated with the sperm of a friend or other known donor or are impregnated by a male sexual partner.[33] Regardless of the manner of conception, the child at issue has a

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31 Byrn and Ives, *Which Came First the Parent or the Child?*, 62 Rutgers L. Rev. 305, 321 (Winter 2010).
32 Nancy Polikoff, *A Mother Should Not Have to Adopt Her Own Child*, 5 Stanford J. Civ. Rts & Civ. Liberties 201, 248 (Oct. 2009).

biological father who possesses legal and fundamental rights of parentage until such rights are legally terminated. *Callender v. Skiles*, 591 N.W.2d 182 (Iowa 1999). Again, any challenge to the lesbian spouse's paternity of the child would be successful as the lesbian spouse would never be the biological father of the child.

Because the parent-child relationship created by applying the presumption of paternity to same-sex couples would not be recognized in the majority of U.S. States, and because such relationship would be subject to constant challenge in Iowa, the district court's statements that applying the presumption of paternity promotes the integrity and stability of these families are simply unsupportable and should not form a basis for ruling in Petitioners' favor. Relying on a presumption that is legally "meaningless"[34] to establish parentage does nothing to promote the integrity or stability

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33 Heather Conrad and Kate Colwell, *Creating Lesbian Families*, (1996).
34 Nancy Polikoff, *A Mother Should Not Have to Adopt Her Own Child*, 5 Stanford J. Civ. Rts & Civ. Liberties 201, 248 (Oct. 2009).

of these families and instead only creates legal uncertainty and introduces risk into the lives of these families.

E. Applying the Presumption of Paternity Only To Lesbian Married Couples Who Conceive Through Use of an Anonymous Sperm Donor While Excluding Lesbians Who Conceive in Alternate Ways and Excluding Gays Highlights the Error in Applying the Presumption to Same-Sex Couples At All

The district court limits its holding to those factual scenarios in which a married woman gives birth to a child conceived through use of an anonymous sperm donor.[35] (Ruling at p. 11; App.). The Court premises its holding with the statement that it is reaching this conclusion "pursuant to *Varnum v. Brien.*" (Ruling at p. 11; App.). However, there is no language in *Varnum* which parses out the rights afforded homosexual parents based upon the manner in which they conceive their children.

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35 The Petitioners conceded at argument before the district court that their analysis of the application of the presumption of paternity would be different if the child at issue was not fathered by an anonymous sperm donor: "If there is a donor who has not relinquished his parental rights, I think the analysis would be somewhat different. There would be a question as to who are the intended parents of the child, and there might be a need to go through a termination of parental rights with respect to that other individual depending on the unique circumstances of the case." (Transcript, p. 43, lines 15 – 20; App. at).

Varnum contains passing references to a myriad of ways in which homosexuals become parents – adoption, foster parenting, procreating "naturally," or procreating through use of assisted reproductive technology. *Varnum*, 763 N.W.2d at 873, 874, 882, 901, 902. There is no holding in *Varnum* that favors with special legal rights any of these methods of reproduction, and there is certainly no language in *Varnum* which supports a position that lesbian married couples who procreate using artificial insemination should have different legal rights than lesbians married couples who rely on a known male donor to provide the genetic contribution for conception. This is so, of course, because there is no holding in *Varnum* regarding the right to parent at all – the decision impacts only the right to marry, precisely because the subject and the purpose of the law at issue was *marriage*, not parentage.

The Court in *Varnum* was expressly not determining whether homosexuals are similarly situated to heterosexuals with respect to "procreating naturally" or fathering a child, but rather whether they are similarly situated "with respect to the subject and purposes of Iowa's marriage laws." *Varnum*, 763 N.W.2d at 883. The district court's ruling underscores the problems in expanding *Varnum*

beyond its intended holding and the difficulties such an expanded interpretation creates.

The district court's ruling would require the Department to apply the presumption of paternity to married same-sex couples in a manner dependent upon the method of conception. This approach would create significant administrative difficulties for the Department and the ninety-nine county recorders who assist in administering the Vital Statistics Law in Iowa. The Department would be required to conduct a two-step inquiry into how each child in this state was conceived – whether the conception occurred "naturally" or by using artificial insemination – and then whether the sperm at issue came from a known donor or an anonymous donor. The many administrative difficulties created by the district court's analysis should be weighed in review of the proper application of this statute.

Finally, the Petitioners assert that the Department should be required to determine who the "intended parents of the child" are prior to applying the presumption of paternity, and that if there is a "question as to who are the intended parents of the child, there might be a need to go through a termination of parental rights with respect to that other individual depending on the unique circumstances of the

case." (Transcript, p. 43, l. 17 – 20; App.). The Department does not have the expertise, legal authority, or jurisdiction to make individual determinations as to who the "intended parents" of a child are based on the unique circumstances of each birth. Nor does the Department -- with a dedicated staff of less than 20 people responsible for registering and providing certified copies for over 38,500 births which occur in Iowa each year -- have the administrative resources to make an independent determination in every birth as to who a child's "intended parents" may be. (CR Exhibit C, Table of Organization, App. ; CR, Exhibit B, Affidavit of Jill France, ¶ 1; App.).

This position of the Petitioners reflects the fundamental difference between the parties about the purpose of the presumption of paternity. Petitioners assert the presumption has no connection whatsoever to biology and should be applied to create legal parentage in whomever the "intended" parent of a child may be. The Department asserts that the presumption of paternity law does not bestow the agency with the right to determine who the "intended parent" of a child may be, but that it solely provides a legal mechanism for efficiently and effectively determining who a child's biological father actually is. If a child's biological father is not the

intended parent or if another party intends to parent the child, the Vital Statistics Code provides that adoption is the legal means to resolve those issues.

In sum, the Vital Statistics Code is designed to result in a birth record which accurately reflects a child's parentage and to accurately capture data about a child's biological parents for statistical and research purposes. While the application of the presumption of paternity to married heterosexual couples results in a very small percentage of fathers listed on birth certificates who are not biological fathers, in the vast majority of births in Iowa applying the presumption in this manner results in a birth certificate which accurately reflects a child's biological parents. The Department strongly asserts that the presumption of paternity statute does not grant the agency the authority to unilaterally determine who a child's "intended" parents are, and that non-biologically connected individuals who intend to parent a child – whether they are homosexual or heterosexual – should be required to proceed with an adoption to establish themselves as a child's legal parent.

CONCLUSION

For the above-stated reasons, the Iowa Department of Public Health requests that this Court reverse the January 4, 2012, Ruling of the District Court and affirm the Department's refusal to issue Petitioner Mackenzie Gartner a new certificate of birth absent an adoption order from a court of competent jurisdiction.

REQUEST FOR ORAL ARGUMENT

Appellant requests that it be heard at the time of final submission of this matter.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because this brief contains 8,856 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) because this brief has been prepared in a proportionally spaced typeface using 14 point Georgia font.

COST CERTIFICATE

I hereby certify the actual cost of reproducing the necessary copies of Appellant's Proof Brief and Request for Oral Argument was $ 17.70.

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