IN THE SUPREME COURT OF IOWA

Supreme Court Case No. 12-0243

HEATHER MARTIN GARTNER and MELISSA GARTNER, individually and as next friends of MACKENZIE JEAN GARTNER, a minor child, Petitioners-Appellants, v. IOWA DEPARTMENT OF PUBLIC HEALTH, Respondent-Appellee.	On appeal from the Iowa District Court for Polk County Case No. 67807 The Honorable _____, presiding

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION FOUNDATION AND AMERICAN CIVIL LIBERTIES UNION OF IOWA

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I certify that on the 21st day of May, 2012 I served a copy of this Brief for the Petitioner/Appellant on the parties to this action by depositing said copies in the United States mail at Des Moines, Iowa, postage prepaid, addressed as follows:

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Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

Constitutional Provisions

INTRODUCTION

This Court, having already determined that the Iowa Constitution affords gay and lesbian couples equal access to the institution of marriage, must now enforce that determination as it applies to recognizing married lesbian mothers as parents on their children's birth certificates, on the same terms as married different-sex parents. The trial court's decision recognizing Melissa Gartner as a parent on her daughter Mackenzie Gartner's birth certificate should be affirmed in order to uphold the Gartners' rights to equal protection and to substantive due process. That several other U.S. jurisdictions already list both married mothers on birth certificates illustrates that the Iowa Department of Health does not have a compelling, important, or even rationally related legitimate interest in maintaining its current discriminatory and exclusionary birth certificate policy.

INTEREST OF THE AMICI

Amicus American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 550,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. For more than ninety years, the ACLU has sought to advance these principles of liberty and equality, and to that end has frequently appeared before the United States Supreme Court, this Court, and other state courts, both as direct counsel and as *amicus curiae*. Among other issue priorities, the ACLU works for an America free of discrimination on the basis of sexual orientation. Because this case implicates

important constitutional questions, its resolution is a matter of substantial concern to the ACLU and its members. The ACLU's input regarding constitutional principles at stake in this case and comparative approaches taken by other states will assist the Court in resolution of this appeal.

Amicus the ACLU of Iowa is one of the state affiliates of the national ACLU, with more than 3,000 members statewide. The ACLU of Iowa also has a long history of advocacy for civil and constitutional rights, including the rights of gay and lesbian Iowans. The ACLU of Iowa's members include lesbian Iowans whose interests and rights will be directly affected by the outcome of this case.

ARGUMENT

Introduction

Iowa law presumes the existence of a parental relationship with both spouses for children born into a marriage. *See* Iowa Code §§ 252A.3(4), 598.31 (2012).[1] Iowa Code Section 144.13(2) establishes a procedure for preparing a child's birth certificate, based on the spousal presumption of parentage:

> 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

[1] This presumption is rebuttable only by clear, strong, and satisfactory evidence, taking into account not only biological paternity but also whether a parenting relationship exists. *See, e.g., In re Marriage of Schneckloth,* 320 N.W.2d 535, 536 (Iowa 1982); *Huisman v. Miedema*, 644 N.W.2d 321 (Iowa 2002).

> 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….

Iowa Code § 144.13(2) (2012). This means that husbands of biological mothers are automatically recognized as fathers on their children's birth certificates, even when the children are conceived through donor insemination.

In the 2009 *Varnum* decision, the Iowa Supreme Court held that all "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). However, the State of Iowa through its Department of Health ("State") has refused to interpret and apply Iowa Code Section 144.13(2) in a manner that affords wives of biological mothers fair and equal recognition on their children's birth certificates.

Plaintiffs Heather Gartner (biological mother of Mackenzie Gartner), Melissa Gartner (wife of Heather who was denied listing on Mackenzie's birth certificate), and Mackenzie Gartner brought this case to challenge the State's discriminatory policy with regard to recognition of lesbian parents on birth certificates. *Amici* urge the Court to affirm the trial court's decision, which required the State of Iowa, through its Department of Health (the "State"), to end its discriminatory policy. In addition to the statutory interpretation errors the trial court identified in the State's birth certificate policy and relied on in reaching its decision, the State's current policy violates the equal protection and due process rights of both Melissa and Mackenzie

Gartner, as described herein.

I. Denying the wife of a biological mother recognition as a parent on their child's birth certificate violates both parent and child's rights to equal protection.

A. The Equal Protection framework

Article I, Section 6 of the Iowa Constitution "requires that 'similarly situated persons be treated alike under the law.'" *Wright v. Iowa Dep't of Corr.*, 747 N.W.2d 213, 216 (Iowa 2008), Iowa Const., art. I, § 6 ("All laws of a general nature shall have a uniform operation; the General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens.") The equal protection guarantee of the Iowa constitution is substantially similar to that of the U.S. Constitution. *See, e.g.*, *Varnum,* 763 N.W.2d at 878 n.6, quoting *Callender v. Skiles*, 591 N.W.2d 182, 187 (Iowa 1999) ("Generally, we view the federal and state equal protection clauses as 'identical in scope, import, and purpose.'"); *Suckow v. NEOWA FS, Inc.*, 445 N.W.2d 776, 777 (Iowa 1989) (article I, section 6 "puts substantially the same limitations on state legislation" as the federal Equal Protection Clause does).

B. The State's policy unconstitutionally discriminates against mothers on the basis of sex.

Iowa's constitution not only guarantees all citizens equal protection under the law, but also explicitly commits the state to treating men and women equally. *See*

Iowa Constitution, article I, section 1 ("All men and women are, by nature, free and equal, and have certain inalienable rights…"). Iowa courts have applied intermediate scrutiny to state laws and policies that discriminate on the basis of sex, requiring the State to prove that such discrimination serves 'important governmental objectives'" and "'the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *Sherman v. Pella Corp.*, 576 N.W.2d 312, 317 (Iowa 1998) (internal citation omitted). The government must show an "exceedingly persuasive justification" for gender-based discrimination to be upheld against constitutional challenge. *Id.*, quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982).

In determining whether the State's birth certificate policy constitutes unconstitutional discrimination, a court must first consider whether the policy "makes a distinction between similarly situated individuals." *State v. Mitchell*, 757 N.W.2d 431, 435-36 (Iowa 2008). Here, the State's policy draws a distinction between women married to their children's biological mothers[2] (who are not recognized as parents on their children's birth certificates, unless and until they complete second-parent adoptions) and men married to biological mothers (who are immediately recognized as parents on their children's birth certificates). *See* Iowa Code § 144.13(2). The male and female spouses of their children's biological mothers are clearly similarly situated

[2] The issues presented in this case are unique to lesbian couples; questions of whether one parent should receive immediate recognition pursuant to statute as a result of being married to the parent who "gave birth to" a child do not arise in the same way for gay male couples.

in terms of the structure of their families.

The State's arguments that male and female spouses are differently situated because only male spouses have the potential to be biological fathers are unavailing. Iowa law already rebuttably presumes the "legitimacy" of any child born to a married woman, and does not require any factual possibility that the woman's spouse is the biological parent of her child. *See* Iowa Code §§ 252A.3(4)(a child born of married parents "shall be deemed the legitimate child or children of both parents") and 598.31; *Mr. L.E. Chancellor*, 1945 WL 60431, Op. Iowa Att'y Gen. (July 16, 1945)(distinguishing legal "legitimacy" from biological "paternity" in determining that a mother's husband should be listed as "father" on the birth certificate of a child born during the husband's extended overseas deployment such that he could not possibly be the biological father); *see, e.g.*, *Schneckloth*, 320 N.W.2d at 536 (noting that "The law…presumes the legitimacy of a child born in wedlock" before determining that proffered evidence, including but not limited to blood test results, was adequate to rebut the spousal presumption and establish another man as the father of a child). Under the current policy, husbands of the many Iowa women conceiving children through donor insemination are entitled to benefit from the spousal presumption even though they are undoubtedly not such children's biological fathers. The spousal presumption protects the integrity of the marital family, even when a biological connection is not present. Because status as a presumed parent under Iowa law (and therefore, the right to be named as a parent on the child's birth certificate) flows from

marriage rather than from any form of procreative activity, men and women are similarly situated with regard to recognition as parents on the birth certificates of children born to their wives. *See Varnum*, 763 N.W.2d at 883 (specifying that a constitutionally permissible law must "treat all those who are similarly situated *with respect to the purpose of the law* alike").

C. The State's policy unconstitutionally discriminates against non-biological mothers on the basis of their sexual orientation.

Similarly, the State's current birth certificate policy represents unconstitutional discrimination on the basis of sexual orientation. The State's policy clearly distinguishes on the basis of sexual orientation, because it applies different rules to the processing of a birth certificate application depending on whether the biological mother is married to a man or to a woman. A biological mother's lesbian wife is similarly situated to a biological mother's heterosexual husband for the purpose the birth certificate scheme seeks to serve, which is to identify the people who are parents of the child. Like sex discrimination, discrimination on the basis of sexual orientation is subject to intermediate, if not strict, scrutiny under Iowa constitutional jurisprudence. *Varnum*, 763 N.W.2d at 897.

The Iowa Supreme Court in *Varnum* concluded that Iowa gay and lesbian couples must be permitted to undertake all the rights and responsibilities of marriage, just like heterosexual couples. *See id.* at 907. *Varnum* established that Iowa gay and lesbian couples are entitled to full inclusion in the legal institution of marriage. The

spousal presumption of parentage is one aspect of marriage, and the automatic inclusion of the spouse of a child's mother on the child's birth certificate manifests that presumption. The *Varnum* court even cited Iowa Code "§ 252A.3(4) (children of married parents legitimate)" as an example of statutory provisions "affected by civil marriage status". *Id.* at 903, n.28. The State's policy here excludes lesbian couples from one of the traditional incidents of the institution of marriage and violates the spirit of *Varnum* and the Iowa constitutional principles it reflected. The *Varnum* court clearly did not intend for married lesbian couples to be burdened with the time-consuming process of second-parent adoption in order to obtain the documentation of their parental status (and of their children's legitimacy) that is readily available to heterosexual married couples.

D. The State's current birth certificate policy unconstitutionally discriminates against children born to married lesbian parents.

In addition to unconstitutionally discriminating against Melissa Gartner, the State's birth certificate policy unconstitutionally discriminates against Mackenzie Gartner as well. Children like Mackenzie are being denied access to immediate, clear proof of their relationship with both their parents, despite being similarly situated to children of heterosexual marriages who do receive immediate, clear proof of their relationship to both parents.

The State's current birth certificate policy distinguishes between children born to married lesbian couples who used donor insemination to conceive, and children

born to married heterosexual couples who used donor insemination to conceive. These two groups of children are similarly situated for purposes of the birth certificate regime, as they have identical needs for both parents to exercise legal and financial responsibility, act on their behalf as needed. *See State v. Mitchell*, 757 N.W.2d 431, 435-36 (Iowa 2008) (analyzing "similarly situated" concept).

Children reap important, tangible benefits from the identification of both their legal parents on their birth certificates. In practice, recognition of a parent on a birth certificate allows that parent to, for example: consent to medical treatment for the child; obtain a Social Security card for the child; provide Social Security survivor benefits to the child in the event of the parent's death; provide inheritance to the child in the event of the parent's death intestate; obtain health insurance coverage for the child through the parent's employer-sponsored group health plan; register the child in school and in extracurricular activities; obtain a passport for the child; and accompany the child when traveling, particularly internationally. In the event parents terminate their relationship, listing on the child's birth certificate facilitates identification of individuals who may be in a position to assert legal and physical custody of the child, may be entitled to visitation, and may be obligated to provide financial support, if a parenting relationship has in fact developed between such individuals and the children at issue. While an adoption decree can also provide proof of both parents' relationship to their child and facilitate access to these benefits, adoption decrees can only be obtained through a legal process spanning months and requiring expenditure

of significant time and effort on the part of both parents.[3] An adoption decree will definitely not be available if any of these needs arise within the first months of a child's life, and the child will be disadvantaged through no fault of her own if, at any age, her parents for lack of knowledge or resources have not pursued the adoption process at a time when she could benefit from documentation of her legal relationship to her non-biological parent.

The State's current policy denies children born to married lesbian couples, unlike other children, the tangible benefits of having both parents clearly and immediately identified on their birth certificates. The policy thus discriminates against children on the basis of their parents' status. Children have no control over the circumstances of their birth or the status of their parents. *See, e.g., Reed v. Campbell,* 476 U.S. 852, 854 n.5 (1986); *Plyler v. Doe*, 457 U.S. 202, 220 (1982). The Supreme Court has accordingly held that state actions discriminating on the basis of the status of or relationship between a child's parents are subject to heightened scrutiny. *Clark v. Jeter,* 486 U.S. 456, 461 (1988); *see also Plyler,* 457 U.S. at 220-224 (legislation discriminating against the children of undocumented immigrants would only be constitutional if it furthered a "substantial goal" of the state).[4] Thus, heightened scrutiny should apply

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[3] Most same-sex couples who pursue second-parent adoption incur several thousand dollars in initial costs, but are then able to recoup those costs through the federal adoption tax credit. *See* 26 U.S.C. § 36C.

[4] To the extent that perceived "illegitimacy" still carries stigma, the State's discriminatory birth certificate policy needlessly imposes that stigma on children whose parents were actually married at the time of their birth, by providing them

here because of the birth certificate policy's discrimination against children based on the sex and sexual orientation of their parents.

E. The State's discriminatory policy is not substantially related to the achievement of any important state objective.

The State has attempted to link its discriminatory birth certificate policy to several hypothetical government objectives, but it cannot show that the policy is substantially related to the achievement of those objectives, that the stated objectives are important, or that the justifications given are exceedingly persuasive. Accordingly, the policy cannot be upheld under heightened scrutiny review.

1. "Accuracy"

The State's discriminatory birth certificate policy is not substantially related to its purported interest in advancing "accuracy of vital records." Under Iowa law the spousal presumption still applies in cases where biological paternity of the mother's husband is impossible, *see Chancellor*, *supra*. Moreover, proof the mother's husband is not the biological father is not even adequate to rebut the spousal presumption. *See, e.g., In re Marriage of Steinke*, 801 N.W.2d 34, *3-*12 (Iowa App. 2011) (unpublished table decision). Indeed, the State has conceded up to 5% of children born to opposite-sex married couples, and thus entitled to the designation of a father under the State's discriminatory policy, are not the biological children of those designated fathers. It thus strains credulity for the State to now assert promoting "biological

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inaccurate birth certificates.

accuracy" as an important government interest warrant discrimination against women who are married to their children's mother at the time of birth. Similarly, if "accuracy of vital records" were truly an important interest to which the State were tailoring its programs, the State would not *reissue* birth certificates to show the names of two non-biological parents when children are adopted (or the name of one non-biological parent in cases of second-parent adoption). Finally, the State's allowing, and in cases like the Gartners' effectively requiring, only one parent to be listed on a child's birth certificate further belies its stated interest in advancing "accuracy of vital records." The State is unable to show that its discriminatory birth certificate policy is substantially related to an important governmental interest in "accuracy" because of the many ways its current regime already departs from biological accuracy.

The State also fails to explain why *biological* accuracy is a more important consideration than legal accuracy, since its refusal to list parents like Melissa Gartner on birth certificates renders those certificates inaccurate as records of presumed legal parentage. It also fails to address the fact that emphasizing "biological accuracy" means preferring biological parent-child relationships over other means of family formation, a type of preference which this Court has already found impermissible. *See In re Marriage of Witten*, 672 N.W.2d 768, 781-82 (Iowa 2003) (Iowa's "judicial decisions and statutes . . . reflect respect for the right of individuals to make family and reproductive decisions based on their current views and values"). The purported concern for "accuracy" also ignores the fact that the spousal presumption of

parentage is rebuttable, in the unlikely event that someone other than a mother's spouse should in future more accurately be deemed the child's legal parent. Lastly, the State's focus on "biological accuracy" in this context irrationally privileges the role of an anonymous sperm donor, who has disclaimed any responsibility for or familial relationship to the child, over the role of a parent and caretaker.

2. "Efficiency"

Similarly, although the State asserts "administrative efficiency" as another important governmental interest warranting sex discrimination in the birth certificate regime, its policy does not actually advance administrative efficiency. The State claims that its discriminatory policy serves to prevent litigation that could result if a biological mother's wife, who may not have consented to the child's conception, seeks to be relieved of parental obligations. The State's premise that wives of biological mothers are more likely to seek and/or obtain release from parental obligations because they did not implicitly consent to become parents does not square with its laws and existing policies; the spousal presumption, including automatic inclusion of the biological mother's *husband's* name on a child's birth certificate, attaches even where a heterosexual married couple could not have had sexual contact during the period of conception. Thus, the same "lack of consent" argument is theoretically available to many husbands of biological mothers. Also significantly, there is no dispute as to consent in the present case.

The State further suggests that the biological fathers of children born to

married lesbian couples are likely to initiate litigation to establish and enforce their parental rights. Again, this hypothetical possibility also exists in the case of children born to opposite-sex married couples, including but not limited to the many children born in Iowa to heterosexual couples who conceived via donor insemination. Although Iowa currently has no statute addressing the rights and responsibilities of participants in donor insemination or other types of assisted reproductive technology,[5] Iowa's existing laws, which establish a rebuttable presumption of parentage for children born to married couples, have been effectively applied to families using assisted reproductive technologies, without resulting in a rash of litigation. Extensive litigation is no more likely to occur if the same laws are applied even-handedly to prevent discrimination against women who are married to the mothers of their children. It is also unlikely that the quantity of children born to married lesbian couples will ever be great enough for the volume of litigation theoretically resulting from disputes over parentage in such families to even approach

[5] Several other states have passed statutes confirming that the spousal presumption of parentage applies when children are conceived through assisted reproductive technology. *See, e.g.*, Mass. Gen. Laws ch. 46, § 4B (2012) ("Any child born to a married woman as a result of artificial insemination with the consent of her husband, shall be considered the legitimate child of the mother and such husband"); N.J. Stat. § 9:17-44 ("If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived…"); D.C. Stat. §§ 7-205(3)e(2A), 16-909 (2012)(allowing a second individual who has consented to parent a child conceived through artificial insemination together with the child's biological mother to be listed as a parent on the child's birth certificate, in addition to the statutes that establish a spousal presumption of parentage for children born into any marriage).

the volume of litigation that results from parentage disputes in families headed by married opposite-sex couples, in which husbands are listed on birth certificates regardless of the feasibility of biological paternity.

Finally, as part of its current discriminatory birth certificate regime, the State encourages the wives of biological mothers to pursue second-parent adoptions, in order to obtain judgments and amended birth certificates that affirm the existence of a legal parent relationship. It is absurd to suggest that the expenditure of judicial resources associated with second-parent adoptions is more efficient than the State's simply processing a birth certificate application with the mother's spouse listed as a parent (just as the State does for opposite-sex married couples), even taking into account the theoretical chance that some wives of biological mothers will later seek to rebut the spousal presumption. Thus, the State is unable to show that its discriminatory birth certificate policy is substantially related to an important governmental interest in administrative efficiency.

3. "Paternity"

The State also contends that its discriminatory birth certificate policy serves an important governmental interest in "establishing paternity for use in other contexts." However, blocking recognition of the biological mother's spouse on a child's birth certificate does nothing to establish paternity for use in other contexts. There is no reason to believe that families who are unable to secure recognition of both the biological mother and her wife on a child's birth certificate will proceed to list the

child's biological father on the birth certificate. Indeed, for children like Mackenzie Gartner, conceived through anonymous donor insemination, the name of a biological father is not even available for listing on a birth certificate, and if as the State suggests her parents should adopt her, there will be no "paternity" established as the second-parent adoption will identify both her mothers as parents. For all these reasons, the State's purported interest in "establishing paternity for other contexts" cannot justify its discriminatory birth certificate policy.

Because the State cannot show that its discriminatory birth certificate policy is substantially related to an important governmental objective, the policy represents unconstitutional discrimination on the basis of sex.

F. Even if a rational basis standard were applied, the State has no rational basis for treating the children of married lesbian couples adversely.

As discussed above, classifications that burden children because of their parents' sex and sexual orientation should be subject to heightened scrutiny, which the State's current policy fails. But even if this type of classification were deemed subject to rational basis review, the State would be unable to show that its birth certificate policy is rationally related to any legitimate government purpose. State action has a rational basis only if it is "based upon some apparent difference in situation or circumstances of the subjects placed within one class or the other which establishes the necessity or propriety of distinction between them." *State v. Mann*, 602 N.W.2d 785 (Iowa 1999) (internal citations and quotations omitted). There is no

"necessity" or "propriety" to denying some children the benefits of clear and immediate documentation of their relationship to one of their parents, solely because they happen to be born to a same-sex married couple.

The State's purported justifications do not warrant treating the children born to two married women differently from children born to married opposite-sex couples, even under a rational basis standard. "The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne, Tex., v. Cleburne Living Ctr.,* 473 U.S. 432, 446 (1985). As discussed above, the State's discriminatory birth certificate regime does not advance its stated interests in biological accuracy, administrative efficiency, or establishment of paternity, given the applicability of all these rationales to children of heterosexual couples who were conceived through donor insemination, and the regime's encouragement of married lesbian mothers to adopt in order to secure basic documentation of their family relationships. *See id.* at 449-50 (noting that challenged zoning restriction failed to screen out many facilities that would pose the same purported risks as the plaintiff group home, as basis for deeming restriction irrational and unconstitutional); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 537 (1973) (noting that challenged discriminatory food stamp legislation "simply does not operate so as rationally to further" the interests it allegedly served, as basis for deeming it irrational and unconstitutional); *Romer v. Evans*, 517 U.S. 620, 633 (1996) ("Equal protection of the laws is not achieved through indiscriminate imposition of inequalities" and

legislation discriminatory against gay and lesbian Coloradans was accordingly unconstitutional) (internal quotations omitted). Instead, the current birth certificate regime appears to effect arbitrary discrimination against gay and lesbian families based on disfavor or distrust, as did the state actions invalidated in *Romer, Plyler, and Moreno.* Because the birth certificate regime does not advance the interests cited by the State, it fails even rational basis review.

II. **Denying the wife of a biological mother recognition on their child's birth certificate violates the substantive due process rights of both parent and child.**

The State's exclusionary birth certificate policy not only denies petitioners equal protection, but also violates their rights to substantive due process of law. Iowa's Due Process Clause provides that "no person shall be deprived of life, liberty, or property, without due process of law." Iowa Const., art. I, § 9. "Due process must be afforded when an individual is threatened by state action which will deprive the individual of a protected liberty or property interest." *Callender v. Skiles,* 591 N.W.2d 182, 189 (Iowa 1999), citing *State ex rel. Hamilton v. Snodgrass,* 325 N.W.2d 740, 745 (Iowa 1982). Liberty interests recognized for this purpose include parents' interest in autonomy regarding the care, control, and custody of their children, and all citizens' interest in privacy, which encompasses the rights to family integrity and intra-family association. The State's discriminatory birth certificate policy infringes these fundamental rights and is unconstitutional under the resulting strict scrutiny analysis.

A. The State's current birth certificate policy infringes on non-biological lesbian mothers' fundamental right to parental autonomy.

"The right of a parent to companionship, care, custody, and management of his or her children has been recognized as far more precious ... than property rights ... and more significant and priceless than liberties which derive merely from shifting economic arrangements." *In re A.M.H.,* 516 N.W.2d 867, 870 (Iowa 1994) (internal quotations and citations omitted); *see also In re Marriage of Witten*, 672 N.W.2d 768, 782 (Iowa's "judicial decisions and statutes . . . reflect respect for the right of individuals to make family and reproductive decisions based on their current views and values"). Specifically, a mother's "parental interest in the care, custody, and control of [her child] is a fundamental liberty interest protected by the United States and Iowa Constitutions." *Ashenfelter v. Mulligan*, 792 N.W.2d 665, 673 (Iowa 2010). A parent's gender or sexual orientation may not serve as the basis for restricting her rights or devaluing her parental autonomy. *See generally Varnum,* 763 N.W.2d at 901.

The State's exclusionary birth certificate policy infringes on Melissa Gartner's fundamental right to parental autonomy. It limits her ability to make a host of important decisions about Mackenzie's care, ranging from escorting her in international travel to enrolling her in school or Scouts to authorizing her medical care, as described above, unless and until Melissa secures an adoption decree. These impairments of Melissa's ability to take important actions on behalf of Mackenzie interfere with her "caretaking interest" in directing her child's upbringing. *See Spiker v.*

Spiker, 708 N.W.2d 347, 351-52 (Iowa 2006); *Santi v. Santi,* 633 N.W.2d 312, 317 (Iowa 2001). The circumstances in which a parent typically must produce a copy of her child's birth certificate exemplify the decisions over which parents have autonomy, a liberty interest protected from State intrusion. Although the State permits the wives of biological mothers to ultimately affirm their parental autonomy through adoption, it significantly and impermissibly burdens Melissa's parenting autonomy by forcing her to expend time and effort on the adoption process in order to obtain documentation of her legal relationship with Mackenzie, when male spouses of biological mothers receive such documentation automatically and immediately through birth certificate listing. By withholding from this family the most important and only immediate means of demonstrating Melissa's parental authority to make decisions regarding her care and custody, the State unconstitutionally infringes on Melissa's liberty interest in parental autonomy.[6]

B. The State's exclusionary birth certificate policy infringes on both parents' and children's fundamental rights to family integrity and association.

[6] The fact of being married to a child's mother at the time of birth does not guarantee the existence of a *bona fide* parenting relationship entitled to the full force of constitutional protection. Whether an individual has actually taken on the caretaking parental role so as to affirm a parental liberty interest is a factual question. *See, e.g.*, *Huisman*, 644 N.W.2d at 324-26. Here, though, whether Melissa Gartner has forged a constitutionally protected parenting relationship with Mackenzie is not in dispute; at issue is the State's refusal to grant her the documentation of presumed parental status that is typically available to spouses of Iowa biological mothers. This refusal burdens Melissa's fundamental right to parental autonomy.

Iowa law recognizes a liberty interest, held by both parents and children, in maintaining family integrity. The Iowa Supreme Court has observed that "[F]reedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment… A parent's interest in maintaining family integrity is best protected by the Due Process Clause." *In re A.M.H.,* 516 N.W.2d at 870 (internal quotations and citations omitted); *see also Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (noting Supreme Court's own "historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment")(citations omitted).

The United States and Iowa Supreme Courts have also "recognized that a parent's right to the care and custody of a child is reciprocated by the child's liberty interest in familial association, likewise protected by the Due Process Clause." *F.K. v. Iowa Dist. Court for Polk Cnty.*, 630 N.W.2d 801, 808 (Iowa 2001); *see also Lehr v. Robertson,* 463 U.S. 248, 256-59 (1983). Accordingly, children themselves have a protected liberty interest in family integrity.

The Iowa Supreme Court has already recognized the necessity of updating previous understandings of fundamental rights to adapt to social and scientific evolution in what it means to form and to be a family.

> Due process protections … should not ultimately hinge upon whether the right sought to be recognized has been historically afforded. Our constitution is not merely tied to tradition, but recognizes the changing nature of society. *See Redmond v. Carter,* 247

> N.W.2d 268, 273 (Iowa 1976)…The traditional ways to establish legal parentage have dramatically changed in recent generations, as has the traditional makeup of the family. Scientific advancements have opened a host of complex family-related legal issues which have changed the legal definition of a parent . . . . If 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. Instead, we need to focus on the underlying right at stake. The nontraditional circumstances in which parental rights arise do not diminish the traditional parental rights at stake.

Callender, 591 N.W.2d at 190. Thus, both Melissa and Mackenzie Gartner have liberty interests in the integrity of their family and their ability to associate freely as family with one another (as well as with Mackenzie's biological mother and Melissa's spouse, Heather Gartner), or stated differently, in the security of their parent-child bond. Their associational rights are burdened by a regime that denies Melissa documentation of her familial relationship to Mackenzie and interferes with her caretaking of her daughter, because of the uncertainty this regime creates and because of the risk that Melissa will be unable to accompany Mackenzie during travel, a hospital stay, or another situation in which documentation of her parental relationship is required.. The State's policy of denying mothers like Melissa listing on the birth certificates of children like Mackenzie infringes on both Melissa's and Mackenzie's protected liberty interests in family integrity.

C. Because it infringes fundamental rights, the State's exclusionary birth certificate policy is subject to, and cannot withstand, strict scrutiny.

Because the birth certificate policy at issue here infringes on rights identified as

fundamental, its constitutionality is reviewed under a strict scrutiny standard. *See*, *e.g.*, *Hensler v. City of Davenport*, 790 N.W.2d 569, 582 (Iowa 2010) ("if the ordinance infringes on [plaintiff]'s fundamental right to exercise care, custody, and control over her [child], we must apply strict scrutiny"). Applying strict scrutiny to the policy entails assessing "whether the government action infringing the fundamental right is narrowly tailored to serve a compelling government interest." *State v. Hernandez–Lopez,* 639 N.W.2d 226, 238 (Iowa 2002).

As discussed above, the State's birth certificate policy cannot pass muster under a rational basis or intermediate scrutiny standard of review, much less a strict scrutiny standard. The birth certificate policy is clearly not narrowly tailored to any interest the State has in "biological accuracy," given the numerous other circumstances in which the State issues birth certificates that are not "biologically accurate." The State's purported interest in "administrative efficiency" is clearly not a compelling one. "A state's interest in avoiding an administrative burden becomes compelling only when it presents administrative problems of such magnitude as to render the entire statutory scheme unworkable." *Quaring v. Peterson*, 728 F.2d 1121, 1127 (8th Cir. 1984); *see also Sherbert v. Verner,* 374 U.S. 398, 408-09 (1963). Further, the State's policy of excluding all married lesbian couples, but no married heterosexual couples, from equal recognition on birth certificates (regardless of the means by which children were conceived, or whether biological paternity is possible) is by no means a narrowly tailored means of achieving its objectives. For all of these reasons, the State's current

birth certificate policy violates Iowans' right to substantive due process and is unconstitutional.

III. **Iowa should join other U.S. jurisdictions that recognize wives or female partners of biological mothers on birth certificates.**

In numerous other jurisdictions around the U.S. in which same-sex couples have access to marriage or a similar legal status, the female spouse or partner of a biological mother is listed on a child's birth certificate as a matter of course. These jurisdictions' approaches to the issue, including their readings of the statutory terms "husband" and "father" to encompass lesbian parents, help illustrate that the State of Iowa's exclusionary birth certificate policy is neither necessary nor appropriate.

Massachusetts, the first U.S. jurisdiction to permit same-sex couples access to civil marriage in 2004, shortly thereafter began allowing the listing of the biological mother's wife on a birth certificate as "second parent." *See* Michael Levenson, *Birth certificate policy draws fire: change affects same-sex couples*, Boston Globe, July 22, 2005, http://www.boston.com/news/local/articles/2005/07/22/birth_certificate_policy_draws_fire/ ; Stephen Smith, *Mass. moves to standardize birth certificates*, Boston Globe, Feb. 17, 2011, http://www.boston.com/lifestyle/health/articles/2011/02/17/mass_moves_to_standardize_birth_certificates/. Massachusetts law also explicitly applies the spousal presumption of parentage where a child is born to a married couple as a result of donor insemination, and the statute's reference to a "husband" has been read to

encompass a mother's wife. *See* Mass. Gen. Laws ch. 46, § 4B (2012); *Della Corte v. Ramirez*, 81 Mass. App. Ct. 906, 907 (2012).

The District of Columbia permits marriage for same-sex couples and previously recognized same-sex domestic partnerships. A District statute provides that the name of the spouse or domestic partner of a biological mother at the time a child is conceived or born, or at any time in between, shall be entered as a parent on the child's birth certificate unless parentage has been otherwise formally determined. D.C. Stat. § 7-205(e)(2) and (2A) (2012).

New Jersey has allowed same-sex couples to register as domestic partners since 2004, and in 2007 established a civil union system affording same-sex couples all the rights and responsibilities of marriage. New Jersey law states that a "man is presumed to be the biological father of a child if: (1) He and the child's biological mother are or have been married to each other and the child is born during the marriage…" N.J. Stat. § 9:17-43 (2012). In an unreported 2006 decision, a New Jersey family court held that under this provision, a biological mother's female domestic partner could be listed on the child's birth certificate, and the state agreed to grant without contesting future birth certificate applications listing a mother's female registered domestic partner as a child's parent. *See* Laura Masnerus*, Child Born to Lesbian Couple Will Have Two Mothers Listed*, N.Y. Times, Nov. 16, 2006, http://www.nytimes.com/2006/11/16/nyregion/16mother.html .

Similarly, California has maintained a registry of same-sex domestic

partnerships since 1999, has granted all the rights and responsibilities of marriage to domestic partners since 2005, and formerly allowed same-sex couples to marry. In California, the spousal presumption of parentage extends to a biological mother's female domestic partner or spouse, who is recognized on a child's birth certificate as a matter of course. *See, e.g.*, *Kristine H. v. Lisa R.*, 117 P.3d 690, 696 (Cal. 2005) (rejecting on estoppel grounds an attempt to evade parental responsibilities by the former partner of a child's biological mother, where petitioner had been, among other things, listed as a parent on the child's birth certificate).

New York State began marrying same-sex couples in 2011, and had earlier begun recognizing marriages of same-sex couples that were transacted elsewhere. New York State and New York City (which issues birth certificates for children born within city limits) in 2008 and 2009 respectively established policies of recognizing the wives of married lesbian biological mothers on their children's birth certificates. Associated Press, *NYC Changes Birth Certificate Policy for Lesbians*, Mar. 25, 2009, http://www.nbcnewyork.com/news/local/NYC-Changes-Birth-Certificate-Policy-for-Lesbians.html.

Oregon does not presently allow same-sex couples to marry, but allows them to register as domestic partners. When a child is born to a woman in a registered domestic partnership, her domestic partner is eligible for listing on the child's Oregon birth certificate as a parent. *See* Oregon Dep't of Health Servs., *Fast Facts: for female Oregon Registered Domestic Partners who are registering the birth of a child*, Oct. 22, 2008,

http://public.health.oregon.gov/BirthDeathCertificates/GetVitalRecords/Documents/fastfactsdp.pdf . In Maryland, which currently does not perform marriages or civil unions for same-sex couples but recognizes those performed elsewhere, the Department of Health announced in 2011 that it would begin automatically recognizing a biological mother's wife as a parent on their child's birth certificate. Advocate, *MD OKs Two Moms on Birth Certificate*, Feb. 25, 2011, http://www.advocate.com/news/daily-news/2011/02/14/md-oks-two-moms-birth-certificates .

Oregon, the District of Columbia, California, New Jersey, New York, Maryland, and Massachusetts all issue birth certificates that list a biological mother's female spouse or partner as the child's parent.[7] That so many other jurisdictions are already doing so helps illustrate both that the State of Iowa's protestations about harms associated with recognizing a mother's wife on a child's birth certificate are unfounded and that principles of equal protection and fairness require application of the spousal presumption to mothers' wives.

CONCLUSION

The State's exclusionary birth certificate policy denies equal protection of the

[7] *Amici* have attempted to research the birth certificate policies of all U.S. jurisdictions that currently recognize marriage or a similar status for same-sex couples, and have not learned of any jurisdictions other than Iowa that do not automatically list the wife or female civil union partner of the biological mother on a child's birth certificate. However, *amici* have not been able to locate documentation for all states, several of which began performing civil unions within the past year and/or have not published their birth certificate procedures.

law to married lesbian non-biological mothers like Melissa Gartner as well as to children of married lesbian couples like Mackenzie Gartner. The State's refusal to recognize lesbian non-biological mothers on birth certificates also violates the substantive due process rights of the mothers and their children. The Court should reject the State's interpretation of Iowa Code Section 144.13(2) to exclude mothers' wives. If the Court accepts the State's reading of this provision, it should find the provision unconstitutional both on its face and as applied to the Gartner family. The Court should affirm that Iowa's strong spousal presumption of parentage applies equally to married lesbian mothers and to their recognition on birth certificates.

Respectfully submitted:

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