



(1). Respondent is charged with administering and enforcing sections of Iowa Code chapters 144 and 252A, including the completion and filing of fetal death certificates and administration of the state-wide system of vital records (Iowa Code §§ 144.5, 144.13, and 144.29), and filing documents to establish legitimation and paternity (Iowa Code § 252A.3). Respondent has an office in Polk County, Iowa. The Iowa Bureau of Health Statistics, is a division of Respondent, and is responsible for, among other things, the registration of fetal deaths in Iowa (Iowa Code § 144.2).

## **II. JURISDICTION AND VENUE**

3. This is a suit for judicial review of agency action pursuant to Iowa Chapter 17A.1 *et seq.* Jurisdiction and venue are proper in an Iowa District Court in Polk County in accordance with Iowa Code § 17A.19 (2).

## **III. FACTS**

4. Petitioners JESSICA and JENNIFER are a lesbian couple who have been in a loving, committed relationship since 2008. They met and fell in love while serving in the United States Army in Iraq. Currently, JESSICA is a student, and JENNIFER works for the federal government. JESSICA and JENNIFER both continue to serve in the United States Army Reserves.

5. JESSICA and JENNIFER married in Iowa on October 8, 2010. *See* Exhibit A (marriage certificate).

6. JESSICA and JENNIFER decided together to have children. JESSICA became pregnant via in vitro fertilization using an ovum provided by JENNIFER and sperm from an anonymous donor.

7. On Wednesday, October 19, 2011, JESSICA and JENNIFER went to a medical appointment for a routine check-up during JESSICA's 30<sup>th</sup> week of pregnancy. A nurse detected a fetal heartbeat during this visit.

8. The following morning, on October 20, 2011, JESSICA became concerned that she had stopped feeling fetal movement. JESSICA and JENNIFER together returned to the doctor's office. This time, a nurse detected no heartbeat.

9. That evening, JESSICA and JENNIFER checked in at Genesis Medical Center in Davenport, Iowa, for induction of labor.

10. On October 21, 2011 at 5:04 p.m., JESSICA gave birth to BRAYDEN at 30 weeks' gestation. He had died *in utero* prior to labor because his umbilical cord had become wound around his neck.

11. JESSICA and JENNIFER were able to spend approximately six hours with BRAYDEN that day, holding him and saying their final goodbyes.

12. On the fetal death certificate form, JESSICA filled out the boxes for "mother" and JENNIFER filled out the boxes marked "father" because there was no other place on the form to indicate her parenthood. They indicated on the form that JESSICA is married. *See Exhibit B.*

13. JESSICA and JENNIFER held a funeral service for BRAYDEN on October 29, 2011.

14. On January 12, 2012, Respondent issued an altered fetal death certificate for BRAYDEN that omitted JENNIFER's name. The death certificate consisted of a reproduced image of the form that the women had filled out in their own handwriting, transferred onto an official form, on which someone had erased, redacted or otherwise "whited out" JENNIFER's handwritten name and identifying information. *See Exhibit C.*

15. JENNIFER repeatedly called and left messages with staff at Respondent's Des Moines office detailing the need for corrective action in this matter on January 17, 18, 19, and 20, asking for an explanation. No one has returned her call.

16. Respondent's action in erasing JENNIFER from BRAYDEN's death certificate harms both JESSICA and JENNIFER. When they saw the certificate, both JESSICA and JENNIFER felt devastated.

17. In removing JENNIFER from BRAYDEN's death certificate, Respondent sent the message to JESSICA and JENNIFER and all others who might become aware of Respondent's actions that Respondent and the State of Iowa do not view JENNIFER as BRAYDEN's parent. Instead of treating them as a married couple jointly mourning their stillborn son, Respondent improperly has labeled JESSICA a single woman, and BRAYDEN as born out of wedlock. *See* Iowa Admin. Code 641-96.6(4) (describing birth certificates that list only one parent's name as specifying that a child is "illegitimate," and imposing certain limitations on public access to such records in recognition that this status can be stigmatizing); Iowa Code § 600B.35.

18. By erasing JENNIFER's existence on the sole official record documenting BRAYDEN's passing and his significance to their family, Respondent has caused unnecessary anguish to both JENNIFER and JESSICA, compounding their experience of grief and loss.

19. By treating JENNIFER and JESSICA differently from the way Respondent treats different-sex spouses who have gone through a similar tragedy by listing the mother's spouse's name on the fetal death certificate as the child's other parent, Respondent deprives JESSICA and JENNIFER of equality under the law and equal dignity. There is no justification, let alone a constitutionally adequate one, for visiting this harm and unnecessary suffering on JESSICA and JENNIFER.

## **CLAIM FOR RELIEF**

### **Judicial Review of Agency Action**

20. Petitioners hereby incorporate the allegations of all previous paragraphs as though those allegations were fully set forth herein.

21. Petitioners seek judicial review pursuant to Iowa Code 17A.19 of Respondent's agency action, namely Respondent's refusal to issue an accurate fetal death certificate for BRAYDEN listing both JESSICA and JENNIFER as his parents in reliance on JESSICA's marriage to JENNIFER. The denial of an accurate fetal death certificate to BRAYDEN has caused Petitioners severe distress and prejudiced Petitioners' substantial rights. For example, because only an immediate family member may request a certified copy of the certificate, JENNIFER may be precluded even from asking for a copy of BRAYDEN's death certificate in the future as a result of the elimination of her name on it. Iowa Code §144.43; Iowa Admin. Code 641-96.7.

22. As explained further below, Respondent's actions are "in violation of" Iowa statutory and decisional law (Iowa Code 17A.19(10)(b)), and "[b]ased upon an erroneous interpretation of a provision of law whose interpretation has not clearly been vested by a provision of law in the discretion of the agency" (Iowa Code 17A.19(10)(c)).

23. Additionally, Respondents' actions are "inconsistent with the agency's prior practice or precedents" without credible reasons sufficient to indicate a fair and rational basis for the inconsistency (Iowa Code 17A.19(10)(h)), as Respondent routinely issues fetal death certificates to different-sex spouses naming both spouses as parents.

24. Further, as explained in greater detail below, Respondent's action was "motivated by

an improper purpose” (Iowa Code 17A.19(10)(e)), and is “[u]nconstitutional on its face or as applied or is based upon a provision of law that is unconstitutional on its face or as applied” (Iowa Code 17A.19(10)(a)).

25. Petitioners have exhausted all adequate administrative remedies and continue to be aggrieved and adversely affected by final agency action. “In cases involving a petition for judicial review of agency action other than the decision in a contested case, the petition may be filed at any time petitioner is aggrieved or adversely affected by that action” (Iowa Code 17A.19(3)).

26. Under Iowa law, a child born to a married couple is presumed the legitimate child of both spouses. Iowa Code § 252A.3 (a child born of married parents is considered a child of both spouses for purposes of determining support obligations, and 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 such marriage”); Iowa Code § 598.31 (a child born to a married woman “shall be legitimate as to both parties [spouses], unless the court shall decree otherwise according to the proof” and regardless of later divorce). Iowa’s spousal presumption of legitimacy applies to every child of married parents regardless of whether evidence exists to indicate or even establish that a spouse is not the child’s genetic parent, or that a married couple is incapable of having children to whom they are both genetically related.

27. Iowa’s presumption of legitimacy applies to children of same-sex spouses just as it does to children of different-sex spouses. *See Varnum v. Brien*, 763 N.W.2d 862, 903 n. 28 (2009) (noting that Iowa’s ban on marriage for same-sex couples deprived children of same-sex couples of the benefit of the presumption of legitimacy, citing Iowa Code §252A.3, before

striking down Iowa's marriage ban as unconstitutional). *See also Gartner v. Iowa Department of Public Health*, Polk County Case No. CE 67807 (Iowa Dist. Ct. Jan. 4, 2012), appeal pending (attached as exhibit F).

28. Accordingly, both JESSICA and JENNIFER are presumed parents to BRAYDEN because he was born to JESSICA during JESSICA's marriage to JENNIFER.

29. Iowa law requires Respondent to file a fetal death certificate for all fetal deaths that occur after 20 weeks' gestation or greater. Iowa Code §144.29.

30. Iowa law concerning how Respondent must fill out the spaces for a child's parents on a certificate of live birth is instructive here, and similar principles apply. In accordance with Iowa's spousal presumption of legitimacy, Iowa Code § 144.13(2) imposes a non-discretionary duty on the Iowa Department of Public Health to enter the name of a mother's spouse on a child's birth certificate as the child's second parent absent a court order determining that someone else is the parent: "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."

31. Iowa Code 144.13(2) requires insertion of the mother's spouse's name on a birth certificate *even when it is clear that the child is not and cannot be the biological child of both spouses*. *See* Attorney General Opinion, August 7, 1945 (A child is presumed to be a child of both spouses even when the mother's husband was overseas and had no access to the mother at the time of conception; "[t]he mother's husband's name should appear on the birth certificate even though he is not the real father") (emphasis added) (attached as exhibit D); *see also*,

Attorney General Opinion, July 16, 1945 (a birth certificate of a child born to married parents *must* show the husband as the child's parent even when the mother's request for a certificate was accompanied by written statements from both the mother and an unwed putative father stating: 1) that they had engaged in intercourse leading to the child's conception; 2) that the husband was not the father; and 3) that the husband was serving continuously overseas for more than a year prior to the birth of the child) (attached as exhibit E). In issuing a birth certificate, the Registrar may not ignore "the legal presumption of legitimacy arising from a birth in wedlock" even when presented with uncontroverted evidence that the mother's spouse is not a child's genetic parent. *Id.* at 67.

32. Because the spousal presumption of legitimacy applies equally to children of married same-sex and different-sex couples, and because Iowa law long has required that rules governing marriage and parenting be applied in a gender-neutral manner, the words "husband" and "father" in Iowa Code § 144.13(2) must be read to mean "spouse" and "parent." *See generally Varnum v. Brien*, 763 N.W.2d 862, 903 n. 28 (2009); *Gartner, supra*, Case No. 67807 (Polk County Dist Ct. Jan 4, 2012), appeal pending, at 9-12.

33. This construction is not only required by Iowa law's long-standing mandate of gender-neutrality and other general principles of statutory interpretation, it is necessary to save the statute from the constitutional infirmity that would result if Iowa Code § 144.13(2) were read to bar solely the children of married same-sex couples from obtaining birth certificates listing both parents, while requiring the issuance of such birth certificates to all other children of married parents.

34. There is no reason to apply a different rule for identifying parents on fetal death certificates from the rule that applies for birth certificates. The same spousal presumption of



parentage applies. *Varnum v. Brien*, 763 N.W.2d 862, 903 n. 28 (2009).

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

36. Absent an exceedingly persuasive justification, disparate treatment of persons based on their sex or sexual orientation violates Iowa's equal protection guarantees.

37. Respondent issues fetal death certificates to different-sex spouses naming both spouses as parents on the death certificate in reliance on the parents' marriage – without regard to whether the mother's spouse has a genetic connection to the stillborn child, or whether evidence exists that the mother's spouse is not in fact a genetic parent. However, Respondent has adopted a policy and practice that treats married same-sex parents differently, and has refused to issue an accurate and complete fetal death certificate for BRAYDEN naming both JESSICA and JENNIFER as BRAYDEN's parents in reliance on JESSICA's and JENNIFER's marriage.

38. Respondent thus discriminates impermissibly against JENNIFER and JESSICA based on their sex and sexual orientation.

39. This disparate treatment causes JESSICA and JENNIFER significant distress and deprives them of the dignity afforded to married different-sex parents.

40. Respondents' denial of an accurate fetal death certificate does not serve any compelling, exceedingly persuasive, or otherwise sufficient, legitimate government interest, nor does it serve such interests in an adequately tailored manner. Accordingly, Respondent's conduct violates the equality guarantees of the Iowa Constitution, Article I, §§ 1 and 6.

41. Thus, Iowa law imposes a non-discretionary duty upon Respondent to enter both JENNIFER's and JESSICA's names on BRAYDEN's fetal death certificate as his parents in reliance on JESSICA's marriage to JENNIFER. Respondent's denial of an accurate fetal death certificate violates JENNIFER'S and JESSICA's constitutional guarantees under Iowa Constitution, Article I, §§ 1 and 6.

42. Respondent, in refusing to perform an act which the law enjoins as a duty of Respondent's office, has discriminated against Petitioners JENNIFER and JESSICA, thereby investing them with a sufficient statutory interest to maintain this action to compel performance, irrespective of proof of further injury or damages.

43. Notwithstanding the allegations of paragraph 42, Petitioners JENNIFER and JESSICA indeed have sustained damage as a result of the nonperformance of Respondents' duty to issue an accurate fetal death certificate for BRAYDEN listing both JESSICA and JENNIFER as his parents.

## **RELIEF SOUGHT**

### **Declaratory Judgment and Supplemental (Injunctive) Relief**

44. Petitioners hereby incorporate the allegations of all previous paragraphs as though those allegations were fully set forth herein.

45. This matter is appropriate for declaratory and supplemental relief pursuant to Iowa Code § 17A.19(10) and Iowa Rules of Civil Procedure 1.1101 and 1.1106. Petitioners are

entitled to a declaratory judgment that Respondent must list both same-sex spouses as parents on fetal death certificates and other vital records for children born to married couples, in accordance with Iowa's spousal presumption of parentage, and in the same manner that applies to children born to different-sex spouses. A declaratory judgment, when coupled with the supplemental relief of an injunction, would terminate the controversy between the parties.

46. Petitioners also are entitled to a declaratory judgment that Respondent must list both parents on fetal death certificates as "parents" rather than "mother" and "father," in order to respect the diversity of Iowa families.

47. This matter also is appropriate for injunctive relief pursuant to Iowa Rules of Civil Procedure 1.1106 and 1.1501. Absent injunctive relief, Petitioners will continue to suffer irreparable injury for which there is no adequate remedy at law, as they have no official record of BRAYDEN's death that accurately reflects his significance to their family and, absent injunctive relief, their substantial rights will continue to be violated. Respondent should be enjoined from issuing vital records in a manner that violates the constitutional rights of all same-sex married parents, generally, and specifically, the Petitioners herein.

48. As additional injunctive relief, Respondent should be required to use a form for fetal death certificates that uses the term "parent," rather than "mother" and "father," in order to respect the diversity of Iowa families and to treat all Iowa families equally under the law. There is no statutory impediment to this relief because the specific terms on the form for fetal death certificates are not promulgated by statute.

**WHEREFORE**, Petitioners respectfully request that this Court enter judgment:

A. Reversing Respondent's action and ordering Respondent immediately to issue a corrected fetal death certificate for BRAYDEN that lists both JESSICA and JENNIFER as his parents in reliance on JESSICA's marriage to JENNIFER;

B. Declaring that Respondent's refusal to issue a fetal death certificate for BRAYDEN on the same terms as for stillborn children born to married different-sex parents violates Petitioners' guarantees of equal protection under the Iowa Constitution;

C. Enjoining Respondent from issuing fetal death certificates in a manner that violates the equality guarantees of the Iowa Constitution by omitting the name of one of the parents, and enjoining Respondent from using gender-specific terms for "parent" on such vital records;

D. Awarding Petitioners costs herein; and

E. Granting such other and further relief as the Court deems just and proper.

Respectfully Submitted,

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