IN THE SUPREME COURT OF IOWA

No. 21–1977

AIDEN VASQUEZ and
MIKA COVINGTON,

Appellees/Cross-Appellants,

vs.

IOWA DEPARTMENT OF
HUMAN SERVICES,

Appellant/Cross-Appellee,

Appeal from the Iowa District Court for Polk County
William P. Kelly, District Judge

APPELLANT'S FINAL BRIEF

THOMAS J. MILLER
Attorney General of Iowa

SAMUEL P. LANGHOLZ
THOMAS J. OGDEN
Assistant Attorneys General
1305 E. Walnut Street
Des Moines, Iowa 50319
(515) 281-5164
(515) 281-4209 (fax)
sam.langholz@ag.iowa.gov
thomas.ogden@ag.iowa.gov

ATTORNEYS FOR APPELLANT/CROSS-APPELLEE

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ROUTING STATEMENT

The Supreme Court should keep this case. The district court declared a recent amendment clarifying the scope of the Iowa Civil Rights Act unconstitutional under the equal-protection guarantee of article I, section 6, of the Iowa Constitution. *See* Iowa R. App. P. 6.1101(2)(a). And whether a court can even reach that constitutional question on judicial review of an agency contested case proceeding that wasn't brought under or based on that Act is a substantial issue of first impression that deserves consideration by the Supreme Court. *See* Iowa R. App. P. 6.1101(2)(c).

STATEMENT OF THE CASE

This is a judicial review proceeding under chapter 17A. Petitioners Aiden Vasquez and Mika Covington are Medicaid beneficiaries who each requested pre-approval for gender-affirming surgery paid by Iowa's Medicaid program. Conf. App. 346–52, 1254–72. Their requests were denied by their managed-care organizations. Conf. App. 352, 508–13, 1274, 1420–22. And they appealed those denials to the Iowa Department of Human Services. Conf. App. 8, 938. The Department affirmed the denials in contested case proceedings because a longstanding administrative rule excludes Medicaid coverage for most "cosmetic reconstructive or plastic surgery," including "[p]rocedures related to transsexualism, hermaphroditism, gender identity disorders, or body dysmorphic disorders." Iowa Admin. Code r. 441-78.1(4); *see* Conf. App. 923–24, 932–33, 1522–26, 1666–67.

Vasquez and Covington both filed judicial review proceedings of the Department's decisions, and their cases were consolidated. *See* App. 5–43, 363–399; Order to Consolidate. They argued that the Department's denial of their surgeries—and the Department's rule on which the denials were based—violated the equal-protection guarantee of the Iowa Constitution. *See* App. 27–29 ¶¶ 155–71; App. 383–85 ¶¶ 138–154; *see also* Iowa Const. art. I, § 6. And they claimed the denials violated two statutory requirements for agency

action under section 17A.19. *See* App. 39–40 ¶¶ 235–45; App. 395–97 ¶¶ 218–28; *see also* Iowa Code § 17A.19(10)(k), (n). So they sought an order reversing the denials. *See* App. 43, 399.

But they also made even broader challenges. They argued that a recent amendment to the Iowa Civil Rights Act—clarifying that the Act doesn't require the State or local governments to pay for gender-affirming surgeries—is also unconstitutional. *See* App. 29–39 ¶¶ 172–234; App. 385–95 ¶¶ 155–217. They asserted the statutory amendment violated not just equal protection but also the single-subject requirement of the Iowa Constitution because it was enacted as a part of a larger appropriation bill funding Medicaid and the rest of the State's health and human services operations. *See* App. 29–39 ¶¶ 172–234; App. 385–95 ¶¶ 155–217; *see also* Iowa Const. art. III, § 29. And they contended that because the amendment to the Act should be struck down, the Department's denials and its administrative rule violate the previous version of the Act as well. *See, e.g.*, App. 29–31 ¶¶ 174, 181–85.

The Department moved to dismiss Vasquez and Covington's challenges to the Civil Rights Act amendments and those based on the Act because they were not properly before the court in this limited judicial review proceeding and failed as a matter of law. *See* App. 218–24. The Department also sought dismissal of their requests for broad injunctive and declaratory relief and attorney's

fees. *See* App. 224–29. The Department didn't dispute their right to appeal their core challenge to the Department's denial and the administrate rule on which it was based. *See* App. 218.

The district court partly agreed with the Department. It dismissed Vasquez and Covington's single-subject claim because they hadn't brought it until after the amendment was codified and were thus too late. *See* App. 682. The court also dismissed their claims that the Department violated the Civil Rights Act because they had not exhausted their administrative remedies under the Act. *See* App. 677. But the court didn't dismiss their challenge to the constitutionality of the amendment to the Act. *See id.* And it declined to rule on the propriety of the remedies at the motion-to-dismiss stage. *See* App. 684.

Vasquez and Covington then asked the court to reconsider its dismissal of their Civil Rights Act claims. *See* App. 687–95. They argued that a challenge to an administrative rule based on the Act was proper without following the exhaustion requirement the Act. *See* App. 691–95. But the district court denied the motion and reaffirmed its dismissal of the claims based on the Act. App. 732–35.

The same day, the district court also ruled on the merits of Vasquez and Covington's remaining claims. The court agreed with them that the Department's denial of their request violates the Iowa Constitution's equal-protection guarantee. It reasoned that

the denial—and the Department's administrative rule—failed rational basis review and heightened intermediate scrutiny because nothing in the record suggests that the surgery is not medically necessary or that denying the surgery would save State expense. *See* App. 774, 777, 790–91.

The court went on to also declare the amendment to the Civil Rights Act unconstitutional. The court followed the same analysis, holding that the amendment also failed both rational basis and intermediate scrutiny. *See* App. 774, 777, 790–91. Yet the court rejected Vasquez and Covington's alternative argument that the statute was motivated by unconstitutional discriminatory animus against transgender Iowans. *See* App. 776–80.

The district court also held that their alternative statutory bases under section 17A.19 for reversing the Department's decision failed. *See* App. 791–93. The court denied their requests for broader injunctive and equitable relief. *See* App. 793–94. And it denied their request for attorney's fees, relying on the Court of Appeals' denial of attorney's fees in a similar successful Medicaid judicial review proceeding. *See* App. 794 (citing *Good v. Iowa Dep't of Hum. Servs.*, No. 18-1613, 2019 WL 5424960 (Iowa Ct. App. Oct. 23, 2019)).

The Department then filed a timely notice of appeal. App. 797. And Vasquez and Covington later filed a cross-appeal. App. 800–01.

STATEMENT OF THE FACTS

Iowa Medicaid covers certain medically necessary services for needy Iowans. *See* Iowa Code ch. 249A; Iowa Admin. Code r. 441-78.1; *see also Exceptional Persons, Inc. v. Iowa Dep't of Hum. Servs.*, 878 N.W.2d 247, 248 (Iowa 2016) (noting the Department "is responsible for managing the Medicaid program in Iowa"). And most such services are provided by contracted managed care organizations. *See* Iowa Admin. Code ch. 441-73 pmbl., r. 441-73.2.

Before 1979, the Department had an unwritten policy of excluding sex reassignment surgeries from covered physician services based on existing exclusions and limitations for "cosmetic surgery" and "mental diseases." *Pinneke v. Preisser*, 623 F.2d 546, 549–50 (8th Cir. 1980). That unwritten policy, however, was implemented "[w]ithout any formal rulemaking proceedings or hearings," and so the Eighth Circuit held that this denial of funding was arbitrary. *Id.* at 549; *accord Smith v. Rasmussen*, 249 F.3d 755, 760 (8th Cir. 2001) (characterizing *Pinneke* the same way).

In 1994, the Department clarified its rule excluding surgery performed for primarily psychological purposes to spell out that sex reassignment surgery fell within that exclusion, in compliance with the Eighth Circuit's admonition in *Pinneke*. The resulting rule provides in relevant part:

> 78.1(4) For the purposes of this program, cosmetic, reconstructive, or plastic surgery is surgery which can be expected primarily to improve physical appearance or which is performed primarily for psychological purpose. . . . Surgeries for the purpose of sex reassignment are not considered as restoring bodily function and are excluded from coverage.
>
> a. Coverage under the program is generally not available for cosmetic, reconstructive, or plastic surgery. . . .

Iowa Admin. Code r. 441-78.1(4); *see also* Iowa Admin. Code r. 441-78.1(4)(b)(2) (excluding surgeries for certain conditions, including "transsexualism" and "gender identity disorder"), 441-78.1(4)(d)(15)–(17) (excluding "sex reassignment," "penile implant procedures," and "insertion of prosthetic testicles"). The Eighth Circuit concluded this rule was "both reasonable and consistent with the Medicaid Act." *Smith*, 249 F.3d at 761.

The Legislature later amended the Iowa Civil Rights Act to add "gender identity" to the list of protected classifications. *See* Act of May 25, 2007, ch. 191, §§ 5–6, 2007 Iowa Acts 625, 626–27 (codified at Iowa Code § 216.7(1)(a)). After that amendment, section 216.7(1)(a) provides that it is "unfair or discriminatory" for any "agent or employee" of a "public accommodation" to deny services based on "gender identity." Iowa Code § 216.7(1)(a). Transgender individuals fall within this gender identity classification "because discrimination against these individuals is based on the non-

conformity between their gender identity and biological sex." *Good v. Iowa Dep't of Hum. Servs.*, 924 N.W.2d 853, 862 (Iowa 2019).

In 2017, two transgender Iowans requested preapproval for gender-affirming surgery from Iowa Medicaid. *Good*, 924 N.W.2d at 856. The Department denied the requests based on its longstanding administrative rule excluding the surgery from coverage. *Id.* And the two Iowans sought judicial review of the decision arguing, among other claims, that the decision violated the Iowa Civil Rights Act and the Iowa Constitution. *Id.* This Court eventually held that the Department violated the Act's prohibition on public accommodation discrimination when it denied coverage expressly because the requested procedures related to gender identity disorders. *See id.* at 862. Relying on the "time-honored doctrine of constitutional avoidance," the Court did not hold that excluding coverage for gender-affirming surgery violates the Iowa Constitution. *Id.* at 863.

In response to *Good*, the Legislature again amended the Iowa Civil Rights Act to clarify its scope. *See* Act of May 3, 2019, ch. 85, § 93, 2019 Iowa Acts 243, 287 (codified at Iowa Code § 216.7(3)). The Act now states that its prohibition on public accommodation discrimination "shall not require any state or local government unit or tax-supported district to provide for sex reassignment surgery or any other cosmetic, reconstructive, or plastic surgery procedure re-

lated to transsexualism, hermaphroditism, gender identity disorder, or body dysmorphic disorder." Iowa Code § 216.7(3). The amendment was effective upon its enactment on May 3, 2019. *See* Act of May 3, 2019, ch. 85, § 94, 2019 Iowa Acts at 287. And it was codified when the 2020 Iowa Code was deemed officially published on January 13, 2020. *See* Iowa Code §§ 2B.12(2), 2B.17(2)(b), 2B.17A(2) (setting a default "publication date" of "the first day of the next regular session of the general assembly"); *see also* 2021 Iowa Code Vol. VIII., at VIII-1459 (noting the historical chronology of 2020 Iowa Code).

Shortly after enactment of the Civil Rights Act amendment, Vasquez, Covington, and another plaintiff sued seeking a declaratory judgment that the amendment was unconstitutional. The district court dismissed their suit, holding that the claims were not ripe and that one of the plaintiffs lacked standing. And the Court of Appeals affirmed in *Covington v. Reynolds*, No. 19-1197, 2020 WL 4514691 (Iowa Ct. App. Aug. 5, 2020). The court explained that the plaintiffs "[had] not requested Medicaid pre-authorization, their Medicaid providers [had] not evaluated the request, and no notice of decision had been issued." *Id.* at *3. So the court agreed that "until their Medicaid providers deny them coverage, the controversy is purely abstract because they have not been adversely affected in a concrete way." *Id.* It also reasoned that "[a]lthough the legislature

has amended the ICRA so that the administrative rule no longer violates the law, the question of whether Medicaid must provide a recipient with a gender-affirming surgical procedure still resides, ultimately, with the DHS." *Id.* Thus, the court held that Vasquez and Covington had a legally adequate means of redress through the administrative process. *Id.*

After the Court of Appeals' decision, Vasquez and Covington sought Medicaid preapproval from their MCOs. Conf. App. 346–51, 1254–72. Their requests were denied, and they appealed the denials to the Iowa Department of Human Services. Conf. App. 8, 352, 508–13, 938, 1274, 1420–22. The decisions to deny coverage for their gender-affirming surgeries were both affirmed by the Department in separate contested case proceedings. Conf. App. 923–24, 932–33, 1522–26, 1666–67. And in the spring and summer of 2021, they each filed these cases, seeking judicial review of the Department's denials of their requests under chapter 17A of the Iowa Code. *See* App. 5–44, 363–400. Their petitions make identical legal claims and thus were consolidated and considered by the court together. Order to Consolidate.

In their judicial review petitions, rather than merely seeking to reverse the Department's decisions—so that they could obtain the services they requested from Medicaid—they tried to resurrect

their earlier, broader lawsuit that had been dismissed within the new confines of this narrow judicial review proceeding.

They again sought a declaratory judgment that the Iowa Civil Rights Act amendment—clarifying that the Act doesn't require the State or local governments to pay for gender-affirming surgeries—is unconstitutional for four reasons. First, they claimed that it violates the Iowa Constitution's equal-protection guarantee because it facially discriminates against transgender Iowans. *See* App. 29–31 ¶¶ 172–85; App. 385–87 ¶¶ 155–68. Second, they claimed it violates the same guarantee because "its enactment was motivated by animus toward transgender people." App. 32 ¶ 190; *see also* App. 388 ¶ 173. Third, they claimed the amendment violates the single-subject requirement of the Iowa Constitution because it was enacted as a part of a larger appropriation bill funding Medicaid and the rest of the State's health and human services operations. *See* App. 34–37 ¶¶ 200–20; App. 390–93 ¶¶ 183–203. And fourth, they claimed that the amendment violated the title requirement of the Iowa Constitution because the bill enacting the amendment didn't provide adequate notice of its subject. *See* App. 37–39 ¶¶ 221–34; App. 393–95 ¶¶ 204–17.

Vasquez and Covington argued that the district court should grant this relief under section 17A.19(10)(a) because the denial of their requests was "based on" the Civil Rights Act amendment. *See,*

e.g., App. 29 ¶ 173. They also contended that the relief could be granted under section 17A.19(10)(b) because if the amendment was unconstitutional, it was "null and void," and without the amendment in the Act, the denial violated the Act as previously held by this Court in *Good*. *See, e.g.*, App. 29–31 ¶¶ 174, 181–85.

Along with their attack on the Civil Rights Act amendment, Vasquez and Covington sought to reverse the Department's denial of their surgeries. *See* App. 43, 399. They claimed that the Department's denials—and the longstanding rule on which the denials were based—also violated the equal-protection guarantee of the Iowa Constitution. *See* App. 27–29 ¶¶ 155–71; App. 383–85 ¶¶ 138–154. They claimed the denials violated section 17A.19(10)(k) because the denials were not required by law and had a grossly disproportionate negative effect compared to the public interest. *See* App 39–40 ¶¶ 235–41; App. 395–96 ¶¶ 218–24. And they claimed the denials violated section 17A.19(10)(n) because they were unreasonable, arbitrary, and capricious. *See* App. 40 ¶¶ 242–45; App. 396–97 ¶¶ 225–28.

Vasquez and Covington also sought a permanent injunction prohibiting the Department from any further application of its current administrative rule governing gender-affirming surgeries. *See* App. 42, 398. And they asked for attorney's fees. *See* App. 43, 397.

The Department moved to dismiss Vasquez and Covington's challenges to the constitutionality of the Civil Rights Act amendment and those based on the Act because they weren't properly before the court in this limited judicial review proceeding and failed as a matter of law. *See* App. 218–24. The Department reasoned that its denial and its administrative rules weren't based on the Civil Rights Act—as required by section 17A.19(10)(a)— but on Medicaid rules and statutes. *See* App. 218–19. And since the constitutionality couldn't be considered, the Department's decision also couldn't violate the Act since the amended Act explicitly provides denial of such surgery isn't a violation. *See* App. 220. The Department also noted that text of the Iowa Civil Rights Act precluded claims based on the Act since Vasquez and Covington hadn't filed a complaint with the Civil Rights Commission. *See* App. 220–21.

On the single-subject and title challenges to the amendment, the Department argued that Vasquez and Covington's claims were too late. *See* App. 221–24. This Court requires single-subject and title challenges to be brought before codification of the challenged legislation into the Iowa Code. *See State v. Mabry*, 460 N.W.2d 472, 475 (Iowa 1990). And these suits were filed more than a year after that codification in January 2020. So the Department reasoned those claims fail as a matter of law.

The Department also sought dismissal of their requests for broad injunctive and declaratory relief and attorney's fees because none of the requested relief was available in this judicial review proceeding. *See* App. 224–29. The Department didn't dispute their right to make their core constitutional and statutory challenges to the Department's denials or the administrate rule on which they were based. *See* App. 218.

The district court partly agreed with the Department. It dismissed Vasquez and Covington's single-subject claim because they hadn't brought it until after the amendment was codified and were thus too late. *See* App. 682. The court also dismissed their claims that the Department violated the Civil Rights Act because they had not exhausted their administrative remedies under the Act. *See* App. 677. But it declined to rule on the propriety of the remedies at the motion-to-dismiss stage. *See* App. 684. And the court didn't dismiss the challenge to the constitutionality of the Civil Rights Act amendments. *See* App. 677.

The court started by recognizing that this is a close question. It explained that while "[t]here is no question that DHS based its" decision on its administrative rule, "it is less clear whether DHS's decision was 'based upon' [the Civil Rights Act amendment] for the purposes of section 17A.19(10)(a)." App. 673. The court recounted the parties' arguments and focused on the administrative law

judge's discussion of Vasquez's constitutional challenges to the Civil Rights Act amendment in the Department's contested case ruling. *See* App. 672–75, 677.

The court agreed with the administrative law judge that the Department didn't have authority to rule on a constitutional question. *See* App. 674; *see also* Conf. App. 924, 1526, 1666–67. And it noted that the administrative law judge determined Vasquez had properly preserved his constitutional challenge to the Civil Rights Act amendment. *See* App. 674. But the court never precisely explained why this meant the Department's decision was based on the Civil Rights Act amendment. *See* App. 672–75, 677.

Vasquez and Covington asked the court to reconsider its dismissal of their Civil Rights Act-based claims. *See* App. 689. They argued that a challenge to an administrative rule based on the Act was proper without following the exhaustion requirement the Act. App. 691–95. But the district court denied the motion and reaffirmed its dismissal of the claims based on the Act. App. 732–35.

The same day, the district court also ruled on the merits of Vasquez and Covington's remaining claims. The court agreed with them that the Department's denial of their request violates the Iowa Constitution's equal-protection guarantee. It reasoned that the denial—and the Department's administrative rule—failed rational basis review and heightened intermediate scrutiny because

no evidence shows that the surgery is not medically necessary or that denying the surgery would save State expense. *See* App. 774, 777, 790–91.

The court went on to also declare the amendment to the Civil Rights Act unconstitutional. *See* App. 752–83. It seemed to interpret the Act as a statutory prohibition on gender-affirming surgery, describing it as "Iowa's prohibition against medically necessary gender-affirming surgical procedures in the current statute." App. 783. And it thus analyzed the constitutionality of the statute in essentially the same way as the constitutionality of the Department's rule that *did* ban the surgeries. *Compare* App. 753–83, *with* App. 790–91. The court explained its view that "the constitutional issues" involved in the Civil Rights Act amendment and the Department's rule "are similar, if not identically applied, and unavoidably intertwined." App. 753. So the court similarly held that the statute—like the ban in the rule—failed both rational basis and heightened intermediate scrutiny. *See* App. 774, 777, 790–91.

Still, the court rejected Vasquez and Covington's alternative argument that the statute was motivated by unconstitutional discriminatory animus against transgender Iowans. *See* App. 776–80. And court rejected their other claims of error and requests for even more expansive equitable relief and attorney's fees. *See* App. 791–94. This appeal followed.

ARGUMENT

This appeal is not about the constitutionality of the Department's administrative rule broadly banning Medicaid coverage for gender-affirming surgery. The district court declared this absolute ban unconstitutional under the Iowa Constitution's equal-protection guarantee. And the Department is not appealing that part of the court's ruling.[1]

But at Vasquez and Covington's urging, the district court went further. Even though this is just a narrow appeal of the Department's decision in a Medicaid contested case, the court also declared unconstitutional a recent amendment to the Iowa Civil Rights Act. This was error.

Chapter 17A doesn't give the district court authority to declare the Civil Rights Act amendment unconstitutional because the Act was not a basis for the Department's decision. And even if the challenge could be considered, it isn't a violation of the Iowa Constitution for the Legislature to clarify the scope of the Civil Rights Act in response to judicial interpretation of that Act. This part of the district court's ruling should be reversed.

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[1] When this contested case is remanded to the Department, it will abide by the district court's order and approve Vasquez's and Covington's preauthorization requests. And because of the court's order declaring the current rule unconstitutional, it will also soon start the rulemaking process for the adoption of a new rule governing the scope of Medicaid's coverage for gender-affirming surgery.

In an appeal of a district court's ruling on judicial review of agency action, this Court reviews the district court decision de novo, applying the same standards of review of the agency action that the district court did. *See Bearinger v. Iowa Dep't of Transp.*, 844 N.W.2d 104, 105 (Iowa 2014). The Department's claims of error were preserved because the Department raised these same issues in its motion to dismiss and final brief on the merits. *See* App. 668–71, 576–82. And the district court rejected the Department's arguments and improperly reached the constitutionality of the Civil Rights Act amendment and declared it to violate the Iowa Constitution. *See* App. 672–77, 752–83.

I. Chapter 17A doesn't authorize judicial review of the constitutionality of an amendment to the Iowa Civil Rights Act in a proceeding that wasn't brought under or based on that Act but instead is reviewing the denial of Medicaid benefits based on a Medicaid rule.

Section 17A.19(10)(a) authorizes a court reviewing agency action to "reverse, modify, or grant other appropriate relief" when "substantial rights of the person seeking judicial relief have been prejudiced because the agency action is . . . unconstitutional 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). Relying on this provision, Vasquez and Covington could—and did—argue that the Department's decision in their cases violated the

Iowa Constitution. They also could—and did—argue that the administrative rule on which the Department's decision was based was unconstitutional. And if the Department's decision or administrative rule had been based on a statute with an alleged constitutional defect, Vasquez and Covington could have challenged the constitutionality of that statute as well.

But the Department's decision here wasn't based on any statutory mandate. And it was not "based upon" the Iowa Civil Rights Act, or its 2019 amendment, within the meaning of that phrase in section 17A.19(10)(a). This is a Medicaid contested case, applying the Department's Medicaid administrative rules. The Medicaid program and its rules are authorized by the Medical Assistance Act, Iowa Code ch. 249A—not the Iowa Civil Rights Act, Iowa Code ch. 216.

The Iowa Civil Rights Act amendment that Vasquez and Covington challenge—and the district court held unconstitutional—did clarify that the Act cannot be a basis for requiring "any state or local government unit or tax-supported district to provide for sex reassignment surgery or any other cosmetic, reconstructive, or plastic surgery procedure related to transsexualism, hermaphroditism, gender identity disorder, or body dysmorphic disorder." Act of May 3, 2019, ch. 85, § 93, 2019 Iowa Acts 243, 287 (codified at Iowa Code § 216.7(3)). But this amendment merely limited an enforcement

statute, thus restricting the authority of another agency—the Iowa Civil Rights Commission—to enforce public accommodation law and narrowing the scope of the related private cause of action.

The amendment did not mandate the Department's decision here. And it did not authorize or prompt the administrative rule on which the Department based its decision. That rule had been adopted more than two decades before the challenged amendment. In short, the Department's decision was not "based upon" the amendment to the Iowa Civil Rights Act, and accordingly its alleged unconstitutionality cannot be a basis for relief here.

Vasquez and Covington's claims under Counts II and III are even more defective because this alleged constitutional issue is another step removed from any applicability to this contested case. Because the amendment is unconstitutional, Vasquez reasons, the pre-2019 Iowa Civil Rights Act remains in effect, and its prohibition on gender identity discrimination is violated by the Department's decision here. *See* Iowa Code § 17A.19(10)(b) (authorizing relief when the agency action is "in violation of any provision of law"). Yet as discussed above, the constitutionality of the amendment is outside the scope of this judicial review action. The Civil Rights Act as currently enacted does not require approval of Vasquez's preauthorization request. *See* Iowa Code § 216.7(3). So unlike in *Good*—which

interpreted a prior version of the Act—the Department's decision does not violate the Iowa Civil Rights Act.

The district court rejected these arguments and considered the merits of Vasquez and Covington's challenge to the Civil Rights Act amendment. *See* App. 673–75, 677, 752–83. The court recognized "it is less clear whether DHS's decision was 'based upon' [the Civil Rights Act amendment] for the purposes of section 17A.19(10)(a)." App. 673. Yet the court's reasoning doesn't give much clarity as to why it decided the Department's decision *was* based on the Act.

Aside from recounting the parties' arguments, the court focused on the administrative law judge's discussion of Vasquez's constitutional challenges to the Civil Rights Act amendment in the Department's contested case ruling. *See* App. 672–75, 677.[2] The court agreed with the administrative law judge that the Department didn't have authority to rule on a constitutional question. *See* App. 674; *see also* Conf. App. 924, 1526, 1666–67. But the court seemed to find it dispositive that the administrative law judge determined

[2] The district court's ruling focuses only on Vasquez's contested case proceeding because it was issued before the two cases were consolidated. But the parties agreed—and the court considered—the motion to dismiss ruling to apply to both cases since they raised identical legal claims. *See* Mtn to Consolidate ¶ 12; Order to Consolidate; App. 742–43 & nn. 2–3.

Vasquez had properly preserved his constitutional challenge to the Civil Rights Act amendment. *See* App. 674.

This reasoning doesn't make any sense. If the Department lacks the authority to consider the constitutionality of a statute, any discussion of such a claim has no legal effect—except to the extent that it shows that the claim was in fact raised before the agency and thus properly preserved to raise in the district court. Since the Department has no jurisdiction over the claim *at all*, there'd be no reason for the administrative law judge to rule that the claim couldn't be considered because the Department's action wasn't based on the Civil Rights Act. All the more so here because Vasquez and Covington's claim of agency error under section 17A.19(10)(a) is authority for a *court* to reverse—not for the agency to ignore its otherwise binding rules. *See* Iowa Code § 17A.19(10) ("*The court* shall reverse, modify, or grant other appropriate relief from agency action . . . ." (emphasis added)). And why would a court care if the Department had opined on the constitutional claim since the "it is entirely within the province of the judiciary to determine the constitutionality of legislation enacted by other branches of government."? App. 674 (quoting *NextEra Energy Res. LLC v. Iowa Utils. Bd.*, 815 N.W.2d 30, 44 (Iowa 2012)).

In any event, the Department's rulings only acknowledge that constitutional challenges to the Civil Rights Act amendment were

raised by Vasquez and Covington. *See* Conf. App. 924, 1526, 1666–67. And the Department has never contended that these claims weren't properly preserved. Thus the only reason seemingly given by the district court for holding that the Department's decision is "based on" the Civil Rights Act amendment lacks merit.

Unlike the district court's approach, prior judicial review cases supports a narrow interpretation of "based on" in section 17A.19(10)(a). The Department is aware of no similar cases in which a statute has been declared to be unconstitutional in a chapter 17A judicial review proceeding when the statue doesn't require—or even authorize—the agency action under review. Rather, all constitutional challenges to statutes under chapter 17A have involved agency action that is enforcing or executing the challenged the statute. *See, e.g.*, *Democko v. Iowa Dep't of Nat. Res.*, 840 N.W.2d 281, 286–94 (Iowa 2013) (considering constitutional challenge to resident hunting-license statute in judicial review of agency action revoking license as required by the statute); *Gartner v. Iowa Dep't of Pub. Health*, 830 N.W.2d 335, 344–354 (Iowa 2013) (considering constitutional challenge to statute governing the listing of parents on birth certificates in judicial review of agency action executing the statute); *ABC Disposal Sys., Inc. v. Dep't of Nat. Res.*, 681 N.W.2d 596, 604–06 (Iowa 2004) (considering constitutional challenge to permitting statute in judicial review of agency

action enforcing statute); *Schroeder Oil Co. v. Iowa State Dep't of Rev. & Fin.*, 458 N.W.2d 602, 603–04 (1990) (considering constitutional challenge to tax hearing statute in judicial review of agency action enforcing the statute).

A narrow interpretation is also in line with the structure of chapter 17A. Judicial review of agency action is a narrow appellate proceeding. *See Black v. Univ. of Iowa*, 362 N.W.2d 459, 461–64 (Iowa 1985) (discussing the importance of "maintaining the integrity" of judicial review proceedings as "appellate in nature" while holding that original causes of action cannot be joined with judicial review proceedings). And the relief authorized by section 17A.19(10) is limited to remanding, reversing, modifying, or "grant[ing] other appropriate relief *from agency action*, equitable or legal and including declaratory relief." Iowa Code § 17A.19(10) (emphasis added). And declaring that the current Civil Rights Act is unconstitutional goes well beyond this narrow appellate proceeding and well beyond any appropriate relief from the Department of Human Services' action under review. Indeed, the Department is not even appealing the reversal of its decision here. So Vasquez and Covington will receive their requested Medicaid services no matter if the Civil Rights Act is constitutional.

Interpreting section 17A.19(10)(a) narrowly also follows the canon of constitutional avoidance and a proper respect for the separation of powers. *See Good v. Iowa Dep't of Hum. Servs.*, 924 N.W.2d 853, 863 (Iowa 2019) (discussing and relying on the "time-honored doctrine of constitutional avoidance"). A court shouldn't decide constitutional issues that it doesn't have to. And the narrow interpretation appropriately limits the need to question the constitutionality of statutes to those that are the foundation on which the agency's decision rests.

The district court should have dismissed Vasquez and Covington's claims challenging the constitutionality of the Civil Rights Act amendment in Counts II and III of their judicial review petitions. It shouldn't have reached the merits to declare that amendment unconstitutional. The district court should be reversed.

II. The equal-protection guarantee of the Iowa Constitution doesn't prohibit the Legislature from amending the Iowa Civil Rights Act to clarify that the Act doesn't require governments to provide gender-affirming surgery.

The district court declared an amendment clarifying the scope of the Iowa Civil Rights unconstitutional as a violation of the Iowa Constitution's equal-protection guarantee. *See* App. 752–83. That amendment provides that the Civil Rights Act's prohibition on public accommodation discrimination "shall not require any state

or local government unit or tax-supported district to provide for sex reassignment surgery or any other cosmetic, reconstructive, or plastic surgery procedure related to transsexualism, hermaphroditism, gender identity disorder, or body dysmorphic disorder." Act of May 3, 2019, ch. 85, § 93, 2019 Iowa Acts 243, 287 (codified at Iowa Code § 216.7(3)).

The amended Act doesn't prohibit the State or any other governmental unit from providing for such surgeries. *See* Iowa Code § 216.7(3). It doesn't even provide an authorization for governments to exclude such services if there isn't some other authority for the government to do so. It merely clarifies that failing to provide those surgeries doesn't violate the Civil Rights Act or invoke any of its remedies and enforcement provisions.

The amendment—as is clear from its narrow text—was enacted in response to this Court's decision in *Good v. Iowa Department of Human Services*, 924 N.W.2d 853 (Iowa 2019). There, this Court interpreted the Iowa Civil Rights Act's public accommodation provision, Iowa Code § 216.7, to require the Department to provide Medicaid coverage for gender-affirming surgery. The decision relied heavily on the 2007 amendment to the Act adding gender identity to the list of protected groups for provisions throughout the Act. *See Good*, 924 N.W.2d at 862–63. It reasoned, in essence, that the 2007 amendment continued a series of volleys between courts and the

Department, following the Department's former unwritten policy, the Eighth Circuit's decision in *Pinneke*, the Department's rule it enacted after *Pinneke*, and the Eighth Circuit's decision upholding that rule in *Smith*. *See id.* The Court's own decision became the latest in that series.

And after the *Good* decision, the Legislature continued the volley by enacting this tailored amendment to clarify that the Act's public accommodation protections did not require governments to provide gender affirming surgery. The Legislature could have responded by clarifying Medicaid wasn't a public accommodation—removing all statutory civil rights protections for any protected class. Or it could have removed gender identity protections completely. And it could have even prohibited Medicaid from providing these surgeries. It did none of these things. Instead, the Legislature merely clarified that it did not intend the Iowa Civil Rights Act to mean what the Supreme Court said it did in *Good*.

This is not animus. And it's not constitutionally suspect. Indeed, it is a key feature of constitutional avoidance—permitting the Legislature to respond to a statutory interpretation decision. *See Nelson v. James H. Knight DDS, P.C.*, 834 N.W.2d 64, 81 (Iowa 2013) (Cady, C.J., concurring) ("[L]egislative bodies can clarify or change the law to reflect [their] intent."); *see also, e.g.*, *Taft v. Iowa Dist. Ct.*, 828 N.W.2d 309, 317 (Iowa 2013) ("When a statute is

amended soon after controversy has arisen as to the meaning of ambiguous terms in an enactment, the court has reason to believe the legislature intended the amendment to provide clarification of such terms."); *NextEra Energy Res. LLC v. Iowa Utils. Bd.*, 815 N.W.2d 30, 40 (Iowa 2012) (concluding that when a particular issue "was being litigated in the courts," the timing of a legislative amendment "confirms that the general assembly was trying to clarify the law in this area"); *Bob Zimmerman Ford, Inc. v. Midwest Auto. I, L.L.C.*, 679 N.W.2d 606, 610 (Iowa 2004) (finding "reason to suspect" that a legislative amendment "was in direct response" to a court decision, and thus concluding "it represents an attempt to clarify the meaning of the statute").

The court thus properly rejected Vasquez and Covington's claims that the amendment was unconstitutional because it was enacted with discriminatory animus. *See* App. 777–80. Though they pointed to comments of individual legislators—mostly made by *opponents* of the legislation—the Iowa Supreme Court has repeatedly held that the views of an individual legislator are not persuasive in determining legislative intent. *See, e.g.*, *AFSCME Iowa Council 61 v. State*, 928 N.W.2d 21, 36 (Iowa 2019) (reaffirming that evidence from legislators is "inadmissible on the subject of legislative intent" and noting that "Iowa legislators individually and collectively can have multiple or mixed motives"); *Willis v. City of Des*

Moines, 357 N.W.2d 567, 571 (Iowa 1984) ("We have rejected as inadmissible opinions offered by legislators on the subject of legislative intent."); *Iowa State Ed. Ass'n-Iowa Higher Ed. Ass'n v. Pub. Emp. Relations Bd.*, 269 N.W.2d 446, 448 (Iowa 1978); *Tennant v. Kuhlemeier*, 120 N.W. 689, 690 (Iowa 1909).

But the district court still went astray by conflating its equal-protection analysis of the Civil Rights Act amendment with its analysis of the Department's administrative rule broadly banning coverage for gender-affirming surgery. The court explained its view that "the constitutional issues" involved in the Civil Rights Act amendment and the Department's rule "are similar, if not identically applied, and unavoidably intertwined." App. 753. Indeed the court used essentially the same analysis—by explicitly incorporating them together—to consider the constitutionality of both provisions. *Compare* App. 753–83, *with* App. at 790–91 (repeatedly explaining its analysis of the rule as being "[f]or the same reasons discussed regarding Iowa Code section 216.7(3)," the Civil Rights Act amendment).

It appears this improper conflation of the two distinct legal provisions stems from the district court's wrong interpretation of the Civil Rights Act amendment as a statutory prohibition on providing gender-affirming surgery. When discussing its constitutional conclusion, the court referred to "Iowa's prohibition against

medically necessary gender-affirming surgical procedures in the current statute." App. 783. But no such prohibition exists in *any* Iowa statute, let alone the Civil Rights amendment ruled unconstitutional by the district court here. *See* Iowa Code § 216.7(3) (only limiting the scope of the Act's requirements and not prohibiting *any* provision of surgical procedures).

The Civil Rights Act amendment easily satisfies a proper constitutional analysis of its narrow scope. "The foundational principle of equal protection is expressed in article I, section 6 of the Iowa Constitution, which 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 or immunities, which, upon the same terms shall not equally belong to all citizens.'" *Varnum v. Brien*, 763 N.W.2d 862, 878 (Iowa 2009) (quoting Iowa Const. art. I, § 6). However, "[e]ven in the zealous protection of the constitution's mandate of equal protection, courts must give respect to the legislative process and presume its enactments are constitutional." *Id.* Our system of government requires the legislature and administrative agencies "to make difficult policy choices, including distributing benefits and burdens amongst the citizens of Iowa." *Id.* "In this process, some classifications and barriers are inevitable." *Id.* And it's thus appropriate to apply a rational basis scrutiny here.

See id. at 879; *Planned Parenthood of the Heartland, Inc. v. Reynolds*, 962 N.W.2d 37, 47 (Iowa 2021).

It's rational for the Legislature to respond to a decision of this Court interpreting a statute to adjust the text of the statute to fit with the Legislature's intended scope of the Act. That's what happened here. And presumably to avoid the possibility of other unintended consequences from broader changes, the Legislature drafted the clarification amendment to be largely limited to the issue presented in *Good*. It's rational for the Legislature to be cautious in its approach and address a known litigation issue in this way.

And particularly in light of the known litigation interest, it's rational for the Legislature to decide that it did not want to burden the State and other local governments with the cost of defending future lawsuits on that topic under the Civil Rights with the remedies and attorney's fees that governments could be subject to if claims under the Civil Rights Act were available.

The clarification of the scope of the Act's public-accommodation requirements in section 216.7(3) is right in line with other carve-outs and exceptions to the scope of the Act. For example, small employers are excluded. *See* Iowa Code § 216.6(6)(a). So are employees working in an employer's home or providing certain personal services. *See id.* § 216.6(6)(b)–(c). And certain religious insti-

tutions are permitted to discriminate as employers or public accommodations on the basis of religion, sexual orientation, or gender identity when its related to a bona fide religious purpose. *See id.* §§ 216.6(6)(d), 216.7(2)(a).

Of course, since the statute being refined is the Civil Rights Act, almost by definition the Act is creating a host of classifications. And it provides the benefits and protections of the statute only to those classes the Legislature decided to include and only for the scope defined by the Act's provisions. But it would be problematic if this fact required a heightened scrutiny of any adjustment that somehow implicates a class currently protected by the Act.[3]

And it would be counterproductive to the legislative and judicial processes if the Legislature could never refine the scope of the Act to narrow it after its interpretation by the courts. That would create a one-way ratchet, where once the Legislature granted further protections under the Act it could not retract them. And if that

[3] Nor should this clarification amendment be considered to implicate any quasi-suspect class. Neither this Court nor the United States Supreme Court has decided that transgender people are a quasi-suspect class subject to any heightened equal-protection scrutiny. And whether following the four-factor test in *Varnum*, 763 N.W.2d at 889, or considering the question otherwise, such scrutiny is not appropriate. And this is not a case where it's necessary to reach that question.

were the rule—if the Legislature could never reign in the protections available under the Act granted to a particular class—then the Legislature would likely result in *less* protections available because the Legislature would be even more cautious in ever granting a new class of protections.

CONCLUSION

For these reasons, the district court's decision should be reversed in part. Its declaratory judgment that "Iowa Code section 216.7(3) violates the equal protection provision of the Iowa Constitution on its face and as applied" should be vacated because the constitutionality of that statute was not properly before the court in this judicial review proceeding. Or if it was, that amendment clarifying the scope of the Iowa Civil Rights Act—in direct response to a decision of this Court interpreting the Act—doesn't violate the Iowa Constitution's equal protection guarantee.

REQUEST FOR ORAL SUBMISSION

The Department requests to be heard in oral argument.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

/s/ Samuel P. Langholz
SAMUEL P. LANGHOLZ

/s/ Thomas J. Ogden
THOMAS J. OGDEN
Assistant Attorneys General
1305 E. Walnut Street
Des Moines, Iowa 50319
(515) 281-5164
(515) 281-4209 (fax)
sam.langholz@ag.iowa.gov
thomas.ogden@ag.iowa.gov

ATTORNEYS FOR
APPELLANT/
CROSS-APPELLEE

CERTIFICATE OF COST

No costs were incurred to print or duplicate paper copies of this brief because the brief is only being filed electronically.

/s/ *Samuel P. Langholz*
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font and contains 7,180 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ Samuel P. Langholz
Assistant Attorney General

CERTIFICATE OF FILING AND SERVICE

I certify that on July 7, 2022, this brief was electronically filed with the Clerk of Court and served on all counsel of record to this appeal using EDMS.

/s/ Samuel P. Langholz
Assistant Attorney General