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/CROSS-APPELLEE'S REPLY BRIEF

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ARGUMENT

In their 120-page brief, Vasquez and Covington continue to try to make this case about more than it is. They and their amici attack the State's authority to prohibit the payment for gender-affirming surgery under Iowa's Medicaid program. Yet that issue isn't before this Court. Like the district court, they err in interpreting an amendment to the Iowa Civil Rights Act to be such a prohibition. And this error undermines all their arguments. So even if the Court could reach the constitutionality of that amendment, its clarification of the scope of the Civil Rights Act doesn't violate the equal-protection guarantee of the Iowa Constitution.

Now, in their cross-appeal, Vasquez and Covington improperly seek to enlarge the case further. Even though the district court reversed the Department's denial of their request for preauthorization and declared the rule on which that decision was based unconstitutional—and the Department hasn't appealed those rulings—they contend the district court erred in failing to declare the rule unenforceable on a *second basis* too. They can't do that. It's moot whether the Department's rule also violates the Iowa Civil Rights Act or whether the court properly dismissed their claim asserting that basis for reversing the agency. And a prevailing party has no right to appeal a ruling that had no prejudicial effect on them.

They also appeal the denial of their request for attorney fees. But the district court properly followed the correct logic of a nearly identical unpublished Court of Appeals case—which has only been reinforced by this Court's more recent interpretation of Iowa Code section 625.29. Regardless whether the district court held that the Department's actions violate the Iowa Civil Rights Act, this is still a case under chapter 17A—not the Civil Rights Act. And the Department's role here was "primarily adjudicative" and determining "the eligibility or entitlement of an individual to a monetary benefit." So the district court correctly denied Vasquez and Covington's request for attorney fees and costs.

I. Vasquez and Covington are not entitled to attorney fees and costs. By their own admission, their challenge to the rule is governed by the Iowa Administrative Procedure Act, not the Iowa Civil Rights Act. And the fee-shifting provision in section 625.29 exempts cases in which the role of the State is "primarily adjudicative" or where it determines "the eligibility or entitlement of an individual to a monetary benefit."

Starting with the proper cross-appeal, the Department agrees that Vasquez and Covington's entitlement to attorney fees and costs was raised before and decided by the district court. It is thus preserved for this Court's review. The standard of review for this claim—whether the district court correctly interpreted the fee-shifting statutory provisions—is for correction of errors at law. *Colwell v. Iowa Dep't of Hum. Servs.*, 923 N.W.2d 225, 232 (Iowa 2019).

The Iowa Court of Appeals has already rejected a materially identical claim for attorney fees by similar Medicaid beneficiaries in *Good v. Iowa Department of Human Services.*, No. 18-1613, 2019 WL 5424960 (Iowa Ct. App. Oct. 23, 2019), *further review denied* (Dec. 17, 2019). Vasquez and Covington acknowledge this case and argue that this Court is not bound by it. True enough. But the decision in *Good* was correct.

A. Because Vasquez and Covington did not bring this action under the Iowa Civil Rights Act, that Act's fee-shifting provisions do not apply.

Like the plaintiffs in *Good*, Vasquez and Covington prevailed in their challenge to the Department's denial of Medicaid benefits for gender-affirming surgery in the district court. Also like the plaintiffs in *Good*, Vasquez and Covington argue that the fee-shifting provisions of the Iowa Civil Rights Act entitle them to recover their attorney fees. But as the Court of Appeals explained in *Good*, "the plain language of section 216.16(6) prevents [the plaintiffs] from recovering fees for their suit under this statute." *Good*, 2019 WL 5424960, at *3; *see also* Iowa Code § 216.16(6) ("The district court may grant any relief *in an action under this section* which is authorized by section 216.15, subsection 9, to be issued by the commission." (emphasis added)).

Vasquez and Covington argue the opposite, claiming that prohibiting fee shifting in a claim under the Administrative Procedure Act is inconsistent with the plain language of that Act and the Civil Rights Act. *See* Appellees/Cross-Appellants' Br. at 113. But the statutes they cite don't help them. True, the Iowa Civil Rights Act authorizes the Iowa Civil Rights Commission to award attorney fees and the district court to award any relief that the Commission can award in an action under chapter 216. *See* Iowa Code §§ 216.15(9)(a)(8), 216.16(6). And the Administrative Procedure Act states that "nothing in this chapter shall abridge or deny to any person or party who is aggrieved or adversely affected by any agency action the right to seek relief from such action in the courts." Iowa Code § 17A.19.

But the issue is not whether the Administrative Procedure Act prohibits the operation of the fee-shifting provision of the Iowa Civil Rights Act. Rather, as the Court of Appeals explained in *Good*, the issue is whether the Iowa Civil Rights Act authorizes fee-shifting in an action under section 17A.19. It does not. By its express terms, the Act authorizes the commission to award attorney fees and it authorizes the district court to award attorney fees in an action brought under section 216.16. *See* Iowa Code § 216.16(6). That's it. "Because the language of the fee-shifting provision specif-

ically limits it to proceedings conducted through the ICRA procedures contained in section 216.16," the Court of Appeals—and the district court here—properly held that prevailing plaintiffs in a chapter 17A proceeding "cannot recover fees and costs under this statute." *Good*, 2019 WL 542490, at *3.

B. Vasquez and Covington are not entitled to attorney fees under section 625.29 because the Department's role was primarily adjudicative and its decision concerned entitlement to a monetary benefit or its equivalent.

Vasquez and Covington also contend that they are entitled to attorney fees under Iowa Code section 625.29. Appellees/Cross-Appellants' Br. at 114–24. This statute can indeed apply to a prevailing party in "an action for judicial review brought against the state pursuant to chapter 17A." Iowa Code § 625.29(1). But it prohibits a court from awarding attorney fees if "[t]he state's role in the case was primarily adjudicative" or if the case "arose from a proceeding in which the role of the state was determine the eligibility or entitlement of an individual to a monetary benefit or its equivalent." Iowa Code § 625.29(1)(b), (d). Both exceptions apply here. The district court properly held that Vasquez and Covington can't obtain attorney fees under section 625.29. *See* App. 794

The Department's role in these administrative proceedings was primarily adjudicative. This portion of Vasquez and Covington's argument is squarely controlled by *Endress v. Iowa Department of Human Services*, 944 N.W.2d 71 (Iowa 2020), and *Colwell v. Iowa Department of Human Services*, 923 N.W.2d 225 (2019). In *Endress* and *Colwell*, the Court held that an agency acts in a primarily adjudicative role even if the only decision it makes is that it lacks subject matter jurisdiction to decide a case. *Endress*, 944 N.W.2d at 83; *Colwell*, 923 N.W.2d at 238.

Vasquez and Covington claim that *Endress* is distinguishable because it involved "factual questions requiring agency adjudication" together with preservation of constitutional claims for judicial review. Appellees/Cross-Appellants' Br. at 116. But their proceedings also involved findings of fact and conclusions of law besides preservation of Vasquez and Covington's constitutional claims. Conf. App. 768–70, 922–24, 1519–21, 1666–67. That the Department and the managed care organization didn't contest the factual allegations that the Department found doesn't mean that it didn't act as a factfinder. The Department also concluded that a statutory amendment to the Iowa Civil Rights Act meant that Vasquez and Covington could not rely on the decision in *Good v. Iowa Department of Human Services*¸ 924 N.W.2d 853 (Iowa 2019). *See* Conf. App. 923–24, 1524–25. Because of that legal conclusion, Vasquez

and Covington were left with constitutional claims that the Department had to preserve for judicial review.

As *Endress* explained, "[i]f DHS determines it lacks jurisdiction to hear a dispute it could otherwise adjudicate, a prevailing party cannot ask for section 625.29(1) attorney fees against DHS as the adjudicator." 944 N.W.2d at 83. That is exactly what occurred here and in *Endress*. The Department addressed those issues that it could address. Here, that was finding as a factual matter that Vasquez and Covington were Medicaid beneficiaries and that their physicians concluded that the requested procedures were medically necessary and concluding as a matter of law that the challenged administrative rule barred coverage for the requested services and that *Good* did not apply. And it preserved the constitutional claims over which it lacked subject matter jurisdiction.

Endress also addressed Vasquez and Covington's argument that the Department's "broad interpretation of this exception" would frustrate the legislative purpose of section 625.29. Appellees/Cross-Appellants' Br. at 118–19. There, this Court noted that the legislative history suggests that the Legislature specifically chose to limit the availability of attorney fees under the statute. *See Endress*, 944 N.W.2d at 83.

Section 625.29 also prohibits awarding attorney fees in cases where the State's role is determining entitlement to a monetary

benefit or its equivalent. Vasquez and Covington argue that they were not seeking a monetary benefit or its equivalent, but that they were seeking physician services. But that is not quite right. They were seeking *payments* for physician services. Consider Vasquez and Covington's argument that by prevailing here, they "will have access to medical care that DHS discriminatorily and unconstitutionally denied to them based on their gender identity." Appellees/Cross-Appellants' Br. at 122. But that statement misses a critical distinction at the heart of this issue. Nothing in Iowa law has ever denied them the *medical care* they seek. It has only denied them "access" to that care in that it has refused to pay for it.

In *Colwell*, this Court concluded that the monetary benefit exception applied when a dentist prevailed on a claim seeking reimbursement under a Medicaid dental program. 923 N.W.2d at 238. The United States Supreme Court has described the benefits of the Medicaid program as "essentially financial in character; the Government pays for certain medical services and provides procedures to determine whether and how much money should be paid for patient care." *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 786 (1980). In a published decision, the Missouri Court of Appeals interpreted a materially identical statute to preclude an award of attorney fees for a prevailing Medicaid beneficiary. *Braddock v.*

Missouri Dep't of Mental Health, 200 S.W.3d 78, 81 (Mo. Ct. App. 2006). It explained:

> The Braddocks' administrative claim sought *funding* from the Medicaid waiver program to pay for home modifications. Following the administrative hearing, the appeals referee "ordered [DMH] to fund" the Braddocks' entire request for Medicaid benefits. We therefore conclude that the administrative proceeding involved the determination of a monetary benefit. Even if we accept the Braddocks' argument that their administrative claim actually involved a request for *services*, the funding of those services nonetheless served as the "equivalent" of a monetary benefit. Because the administrative hearing determined the eligibility of the Braddocks for a "monetary benefit or its equivalent," it did not constitute an agency proceeding as defined in Section 536.085(1) and did not qualify for fee recovery under Section 536.087.1.

Id. The point is, Vasquez and Covington are not asking the Department for medical services. They are asking the Department to fund medical services they intend to receive from someone else. As the Iowa and Missouri appellate courts have already concluded, that request is for a "monetary benefit or its equivalent." *See Good*, 2019 WL 5424960, at *4; *Braddock*, 200 S.W.3d at 81. Vasquez and Covington are not entitled to attorney fees under section 625.29.

II. Because the district court reversed the Department's denial of their preauthorization requests and declared the rule on which they were based unconstitutional—and the Department hasn't appealed those rulings—Vasquez and Covington's remaining claims of error in their cross-appeal are moot.

"Courts exist to decide cases, not academic questions of law." *Homan v. Branstad*, 864 N.W.2d 321, 328 (Iowa 2015). A case should be dismissed as moot "if it no longer presents a justiciable controversy because the issues involved are academic or nonexistent." *Id.* (cleaned up). Put another way, the "test is whether an opinion would be of force and effect with regard to the underlying controversy." *Women Aware v. Reagen*, 331 N.W.2d 88, 92 (Iowa 1983). The judiciary's "lawgiving function is carefully designed to be an appendage to [its] task of resolving disputes." *Wengert v. Branstad*, 474 N.W.2d 576, 578 (Iowa 1991). "When a dispute ends, the lawgiving function ordinarily vanishes" and a court "certainly should not go out of [its] way to answer a purely moot question because of its possible political significance." *Id.*

It makes sense then that a prevailing party in the district court cannot appeal. *See Wassom v. Sac Cnty. Fair Ass'n*, 313 N.W.2d 548, 550 (Iowa 1981). This is so even if the party is "somewhat disappointed" in the district court's rejection of "alternative grounds" advanced by the party. *Id.* Indeed, "[a] familiar and long-established rule prohibits any appeal from a finding or conclusion

of law not prejudicial, no matter how erroneous, unless the judgment itself is adverse." *Id.*

The district court reversed the Department's decision to deny Vasquez and Covington's preauthorization request for gender affirming surgery. *See* App. 795. And it declared the Department's administrative rule prohibiting payment for such surgeries unconstitutional. *See id.* It did so by exercising its authority under section 17A.19(10)(a) 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); *see also* App. 746, 790–91. The Department hasn't appealed this ruling and isn't enforcing the rule declared unconstitutional. *See* Appellant's Br. at 24 & n.1.

Yet Vasquez and Covington cross-appeal, seeking to reverse the district court's failure to address their claims that the Department's "Regulation violates ICRA's prohibition against gender-identity discrimination under the preamendment version of section 216.7." Appellees/Cross-Appellants' Br. at 108; *see also id.* at 100–10 (elaborating on their arguments). But they already succeeded in declaring the regulation unconstitutional and reversing the Department's denials based on that regulation. *See* App. 795. They can't

complain that the district court failed to void the regulation for a second reason too, "no matter how erroneous" that ruling. *Wassom*, 313 N.W.2d at 550. Thus, they aren't entitled to appeal and get this Court's advisory opinion on purely "academic questions of law." *Homan*, 864 N.W.2d at 328.

Vasquez and Covington contend this issue isn't moot because the district court's ruling on that claim could affect their entitlement to attorney fees. *See* Appellees/Cross-Appellants' Br. at 108–09. But that's wrong. The district court didn't base its attorney fee ruling on its dismissal of their claims alleging a violation of ICRA. *See* App. 794. And even if the court hadn't granted this part of the Department's motion to dismiss, Vasquez and Covington never brought claims under the Iowa Civil Right Act. *See Good*, 2019 WL 5424960, at *3; Iowa Code § 216.16(6).

They brought their claims under the Iowa Administrative Procedure Act. *See* App. 5 (captioned "Petition for Judicial Review of Agency Action Under Iowa Code § 17A.19"); App. 10–11 ¶¶ 23–37 (citing only chapter 17A and not chapter 216 for the court's jurisdiction); App. 29 ¶¶ 173–74 (bringing Count II "Under Section 17A.19(10)(a)" and "Section 17A.19(10)(b)]"); App. 31 ¶¶ 187–88 (bringing Count III under the same provisions). Even if there were doubt about what's pleaded, we know the petition couldn't include a claim under the Civil Rights Act, because a Plaintiff can't combine

an original action—like one under that Act—with a judicial review action under chapter 17A. *See Black v. Univ. of Iowa*, 362 N.W.2d 459, 461–64 (Iowa 1985).

Vasquez and Covington face one more hurdle in their appeal that the district court "should have concluded that the Regulation violates ICRA." Appellees/Cross-Appellants' Br. at 108. The district court already did so. Despite the court dismissing their claims that the Department violated the Iowa Civil Rights Act, *see* App. 672–77, the court still reached the issue. After holding that the Civil Rights Act amendment and regulation were both unconstitutional, the court also declared that the regulation "is hereby held to violate the Iowa Civil Rights Act." App. 795; *see also* App. 787 ("The analysis above shows that the Regulation used by DHS is actually unconstitutional as well as a violation of the ICRA.").

Given this ruling, it's unclear precisely what—if anything—the court dismissed. But since the Department hasn't appealed the ruling voiding its rule—on whatever basis—this too is merely an academic question. And revisiting the rulings wouldn't provide Vasquez and Covington anything. Their claims of error are moot.

III. Contrary to Vasquez and Covington's contention, it's the district court—not the Department—that erred in relying on the Department's lack of jurisdiction over constitutional issues in deciding to consider the constitutionality of the Iowa Civil Rights Act amendment.

Vasquez and Covington contend that the Department "mistakenly suggest that its lack of 'jurisdiction' to decide the constitutionality of [the Iowa Civil Rights Act amendment] supports finding that its denials of Petitioners' request for coverage were not 'based upon'" that Act. Appellees/Cross-Appellants' Br. at 54; *see also id.* at 54–56. But that's not what the Department argued. *See* Appellant's Br. at 29–30. And the Department agrees with Vasquez and Covington that its lack of jurisdiction is irrelevant to the proper analysis of whether its denials were based on the Iowa Civil Rights Act amendment. *See* Appellees/Cross-Appellants' Br. at 54.

But the district court apparently saw things differently. It relied on the administrative law judge's finding of lack of jurisdiction as its only reasoning for deciding that the denial was based on the Iowa Civil Rights Act. *See* App. 672–75, 677. *That's* why the Department discussed the issue: to explain why the district court's "reasoning doesn't make any sense." Appellant's Br. at 29. If the lack of jurisdiction to decide constitutional questions isn't relevant to deciding whether the denials are based on the Iowa Civil Rights Act—as the parties seem to all agree—then there is no valid reasoning in the district court's ruling explaining why it ruled the way it did.

Properly interpreting section 17A.19(10)(a), the district court has no authority to declare a provision of the Iowa Civil Rights Act—Iowa Code section 216.7(3)—unconstitutional. The Department's denial—and the administrative rule on which the denial was based—were not "based upon" section 216.7(3). So the statute's constitutionality could not be considered by the district court. *See* Appellant's Br. at 25–32. Nor should it be considered here.

IV. Vasquez and Covington's arguments that the Civil Rights Act amendment—section 216.7(3)—is unconstitutional continue to mischaracterize that statute.

Throughout their briefing, Vasquez and Covington—and their supporting amici—continue to treat the challenged Civil Rights Act amendment as a prohibition on gender-affirming surgery. *See* Appellees/Cross-Appellants' Br. at 35, 85–100; *see also e.g.,* Br. of One Iowa et al. as Amici Curiae in Support of Appellees/Cross-Appellants at 19; Br. of Bay Area Lawyers for Individual Freedom et al. as Amici Curiae in Support of Appellees/Cross-Appellants at 18.

But their confident assertions cannot overcome the text of the statute. Section 216.7(3) 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)).

This statutory text doesn't prohibit gender-affirming surgery. And contrary to Vasquez and Covington's contention, it doesn't provide a basis "standing alone" for the Department "to deny Medicaid coverage for gender-affirming surgery." Appellees/Cross-Appellants' Br. at 58. The Department's authority to define Medicaid coverage comes from the Medicaid Act—not the Iowa Civil Rights Act. *See* Iowa Code ch. 249A. All section 216.7(3) does is clarify that a denial doesn't impose liability under—or otherwise violate—the Iowa Civil Rights Act. Nothing more.

Vasquez and Covington's improper conflation of the statute with a prohibition undermines their constitutional analysis of the statute. Rather than considering whether the Legislature had a basis to prohibit surgery, the proper analysis should look to whether it's reasonable for the Legislature to respond to a decision of this Court interpreting a statute to adjust the text of the statute to fit with its intended scope of the Act and limit government liability and litigation. *See* Appellant's Br. at 32–40.

And that constitutional litigation arose here, doesn't make it irrational for the Legislature to limit litigation under the Iowa Civil

Rights Act. *Contra* Appellees/Cross-Appellants' Br. at 84. The Legislature can't prevent *all* litigation. But it can decide whether the robust remedies available under the Civil Rights Act are available for the denial of gender-affirming surgery. *See* Iowa Code § 216.15(9). And it can decide whether it wants to yield to an interpretation of its statute that would arguably affirmatively require all governments to begin providing gender-affirming surgeries if they provide any similar healthcare services.

The court shouldn't address the constitutionality of section 216.7(3). But if it does so, the statute doesn't violate the equal-protection guarantee of the Iowa Constitution.

V. Neither the Department nor Vasquez and Covington have appealed the district court's ruling declaring the Department's administrative rule unconstitutional and this Court should reject their unsupported request for an advisory opinion on its constitutionality.

In the introduction and conclusion of their brief, Vasquez and Covington argue "this Court should hold that the district court . . . correctly determined that the Regulation [prohibiting payment for gender-affirming surgery] violates the Iowa Constitution's equal-protection guarantee. Appellees/Cross-Appellants' Br. at 34, 36, 124. But the Department hasn't appealed that ruling. *See* Appellant's Br. at 24. Neither have Vasquez and Covington. *See* Appellees/Cross-Appellants' Br. at 36–37. Nor could they; the district court ruled in their favor. *See Wassom*, 313 N.W.2d at 550.

They recognize that the Department "opted not to appeal the district court's ruling." Appellees/Cross-Appellants' Br. at 36. But they still urge the Court to "affirm that ruling because [the Civil Rights Act amendment] cannot be divorced from its intended purpose: reinstating the discriminatory Regulation." *Id.* That's not an accurate interpretation of the Civil Rights Act amendment. The constitutionality of that statute isn't properly before the Court in this proceeding anyway. And they offer no legal authority for the authority to grant such a request. *See* Iowa R. App. P. 6.903(2)(g)(3) ("Failure to cite authority in support of an issue may be deemed waiver of that issue."). Indeed, it only appears in their introduction and conclusion and isn't fully briefed elsewhere.

But even setting that all aside, no party has appealed this ruling. It isn't before the Court. And while Vasquez and Covington apparently are "somewhat disappointed" that the Department chose not to appeal, *Wassom*, 313 N.W.2d at 55, that doesn't give them the right to seek affirmance of a ruling in *their* favor. And unnecessarily reaching this unappealed issue would violate "the time-honored doctrine of constitutional avoidance. *Good v. Iowa Dep't of Hum. Servs.*, 924 N.W.2d, 853, 863 (Iowa 2019). This attempt to improperly expand this appeal—like Vasquez and Covington's others—should be rejected.

CONCLUSION

For these reasons, the district court's decision should be reversed in part and affirmed 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.

The district court's denial of Vasquez and Covington's request for attorney fees should be affirmed. And their additional claims of error that the court should have reversed the Department on additional grounds should be dismissed because they're moot and Vasquez and Covington aren't prejudiced by the court's rejection of them.

Respectfully submitted,

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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*
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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 4,124 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 August 23, 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