Supreme Court No. 21–1977
Polk County Case Nos. CVCV061729 & CVCV062175

IN THE SUPREME COURT OF IOWA

AIDEN VASQUEZ and MIKA COVINGTON,

Petitioners–Appellees–Cross-Appellants,

v.

IOWA DEPARTMENT OF HUMAN SERVICES,

Respondent–Appellant–Cross-Appellee.

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

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

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I. Did the district court correctly determine that it had the authority to adjudicate Petitioners' challenges to Division XX of House File 766?

Cases

Carolan v. Hill, 553 N.W.2d 882 (Iowa 1996)

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II. Did the district court correctly determine that Division XX violates the Iowa Constitution's equal-protection guarantee?

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PETITIONERS' CROSS-APPEAL

III. Did the district court err in concluding that Petitioners were required to assert their Iowa Civil Rights Act claims before the Iowa Civil Rights Commission prior to asserting them before the district court?

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IV. Did the district court err in declining to enter judgment in Petitioners' favor on their claims for gender-identity discrimination?

Cases

Bearinger v. Iowa Dep't of Transp., 844 N.W.2d 104 (Iowa 2014)

Good v. Iowa Dep't of Human Servs., 924 N.W.2d 853 (Iowa 2019)

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V. Did the district court erred in denying Petitioners' requests for attorney's fees under the Iowa Civil Rights Act and the Iowa Equal Access to Justice Act?

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ROUTING STATEMENT

Aiden Vasquez ("Mr. Vasquez") and Mika Covington ("Ms. Covington") (together, "Petitioners") respectfully ask this Court to retain this case under sections 6.1101(2)(a), (b), (c), (d), and (f) of the Iowa Rules of Appellate Procedure. Iowa R. App. P. 6.1101(2)(a), (b), (c), (d), & (f).

STATEMENT OF THE CASE

I. Overview

In its opening brief, the Iowa Department of Human Services ("DHS") mischaracterizes Division XX of House File 766 ("Division XX")—now codified at Iowa Code § 216.7(3)—as a routine amendment to the Iowa Civil Rights Act ("ICRA") that was "right in line with other carve-outs and exemptions to the scope of [ICRA]." (Br. at 40.) In reality, Division XX was anything but routine. The law expressly undermined this Court's decision in *Good v. Iowa Department of Human Services*, 924 N.W.2d 853 (Iowa 2019), by reinstating the discriminatory regulation deemed to violate ICRA's prohibition against gender-identity discrimination in that case.

"Gender identity" is a well-established medical concept referring to a person's internal sense of gender. (App. II 807, ¶ 10.) All human beings develop this basic understanding of belonging to a gender. (*Id*.) Gender identity is an innate and immutable aspect of personality. (*Id*., ¶ 9; App. II 813–14, ¶¶ 34–35, 38.) Typically,

people who are designated male at birth based on their external anatomy identify as boys or men, and people designated female at birth identify as girls or women. (App. II 807, ¶ 11.)

For transgender people, gender identity differs from the sex assigned to them at birth. (App. II 807–08, ¶¶ 9, 11.) Women who are transgender, for example, are women who were assigned the male sex at birth but have a female gender identity. (*Id*.) Similarly, men who are transgender are men who were assigned the female sex at birth but have a male gender identity. (*Id*.) The medical diagnosis for the feeling of incongruence between one's gender identity and birth-assigned sex is "gender dysphoria," previously known as "gender-identity disorder" or "transsexualism." (App. II 808, ¶ 12.)

In this case, Petitioners challenged the constitutionality and legality of section 441–78.1(4) of the Iowa Administrative Code (the "Regulation") and Division XX, both of which unlawfully discriminate against transgender people. Iowa Admin. Code r. 441–78.1(4)(b)(2) (2022); Iowa Code § 216.7(3) (2022). The Regulation categorically bans Medicaid coverage for surgical treatment of "transsexualism," "gender identity disorder," and "sex reassignment." Iowa Admin. Code r. 441–78.1(4)(b)(2) (2022). It "specifically exclude[s]" coverage for "[p]rocedures related to transsexualism . . . [or] gender identity disorders." *Id*. It also states that "[s]urgeries for the purpose of sex reassignment are not considered as restoring

bodily function and are excluded from coverage." *Id*. Division XX, for its part, states that ICRA "shall not require any state or local government unit or tax-supported district to provide for sex reassignment surgery" or any surgical procedure "related to transsexualism [or] gender identity disorder." 2019 Iowa House Acts, House File 766, Division XX (codified at Iowa Code § 216.7(3) (2022)).

The Regulation and Division XX are inextricably linked. On March 8, 2019, in *Good*, this Court held that the Regulation's categorical ban on Medicaid coverage for gender-affirming surgery violated ICRA's prohibition against gender-identity discrimination in public accommodations. *Good*, 924 N.W. 2d at 862–63. On May 3, 2019, the legislature enacted Division XX to negate the *Good* decision by exempting state and local government units from ICRA's nondiscrimination protections for transgender Iowans seeking Medicaid coverage for gender-affirming surgery. Iowa Code § 216.7(3) (2022).

After *Good* was decided and Division XX was enacted, Mr. Vasquez and Ms. Covington, who are transgender, requested Medicaid coverage for, respectively, a phalloplasty and a vaginoplasty to treat their gender dysphoria. (App. II 346; App. II 1255.) A total of seven medical providers agreed that the surgical procedures Mr. Vasquez and Ms. Covington sought to undergo were medically necessary. (App. II 160–74; App. II 1533–52.) Despite this consensus, Amerigroup of Iowa Inc. ("Amerigroup"), the managed-care organization ("MCO") to which Mr. Vasquez

and Ms. Covington are assigned under Iowa Medicaid, denied coverage for the surgeries based on the Regulation, and DHS upheld the denials. (App. II 352, 158, 527, 932; App. II 1083, 1212, 1274, 1665.)

Over five years have passed since the beginning of the administrative proceedings that led to the *Good* decision. Now, for first time since those proceedings began—and after substantial efforts by Petitioners, and by the litigants in the *Good* case, during that time period—DHS has conceded that the Regulation is indefensible, stating, in its opening brief, that "[t]his appeal is not about the constitutionality of [DHS's] administrative rule broadly banning Medicaid coverage for gender-affirming surgery." (Br. at 25.) DHS has committed to "abid[ing] by the district court's order and approv[ing] [Mr.] Vasquez's and [Ms.] Covington's preauthorization requests" once "this contested case is remanded to DHS." (*Id.*)

Petitioners agree that it would be futile for DHS to continue defending the constitutionality of the Regulation. But DHS's decision not to appeal the district court's ruling that the Regulation violates the Iowa Constitution's equal-protection guarantee does not, and cannot, wall off the admittedly discriminatory Regulation from the law that reinstated it, given that Division XX and the Regulation are "unavoidably intertwined." (App. I 753.) As discussed in further detail below, in deciding DHS's appeal, this Court should hold that the district court (1) correctly determined that it had the authority to adjudicate Petitioners' challenges to the

constitutionality of Division XX, (2) correctly determined that Division XX violates the Iowa Constitution's equal-protection guarantee, and (3) correctly determined that the Regulation violates the Iowa Constitution's equal-protection guarantee.

In addition, on Petitioners' cross-appeal, this Court should hold that the district court (1) erred in concluding that Petitioners were required to assert their ICRA claims before the Iowa Civil Rights Commission (the "Commission") prior to asserting them before the district court, (2) erred in declining to enter judgment in Petitioners' favor on their claims for gender-identity discrimination under ICRA, and (3) erred in denying Petitioners' requests for attorney's fees under ICRA.

First, the district court had the authority to adjudicate Petitioners' challenges to the constitutionality of Division XX. Division XX amended ICRA, and the connection between Division XX and the discriminatory policy of the Regulation it reinstated is neither theoretical nor speculative, as DHS incorrectly asserts. On the contrary, but for Division XX's enactment, DHS's denials of Petitioners' requests for Medicaid coverage would have been prohibited under the version of ICRA that existed before Division XX was signed into law, as recognized in *Good*. DHS's decisions thus were "based upon a provision of law"—i.e., Division XX—"that is unconstitutional on its face or as applied." Iowa Code § 17A.19(10)(a) (2022). As a result, Petitioners' challenges to the constitutionality of Division XX fell well within

the scope of the chapter 17A judicial-review actions Petitioners filed to overturn DHS's decisions.

Second, Division XX violates the Iowa Constitution's equal-protection guarantee because it (1) facially discriminates against transgender people and (2) was motivated by animus toward them. The statute is unconstitutional under either heightened scrutiny or rational-basis review. Heightened scrutiny is appropriate because Division XX creates a classification based on transgender status. Under heightened scrutiny, there is no important government objective or compelling government interest advanced by excluding transgender people from Medicaid reimbursement for medically necessary procedures. Under rational-basis review, there is no plausible, legitimate government purpose advanced by, or rationally related to, an exclusion that prohibits medically necessary surgical treatment.

In addition, even absent a suspect classification, a statute that targets a disadvantaged group based purely on animus toward that group is categorically prohibited under equal protection. This is precisely what Division XX does, as illustrated by the facially discriminatory classification it creates; the judicial and legislative history of the law, including the antitransgender legislative commentary preceding its enactment; the demonstrated pretextual nature of DHS's asserted motives for the law, such as cost savings; and the procedural framework in which

the law was passed, including the compressed 32-hour time frame leading up to its adoption by the legislature.

Third, the Regulation that the statute reinstated violates the Iowa Constitution's equal-protection guarantee, as DHS now concedes. Under the Regulation, Iowa Medicaid covers certain surgical treatment for nontransgender Medicaid participants that it does not cover for transgender Medicaid participants, even though the treatment is a medically necessary part of the latter group's gender-affirming care. Both groups need financial assistance for the treatment, but only one group receives the assistance. There is no compelling or important government interest furthered by this discriminatory classification. As a result, the Regulation fails heightened scrutiny, both strict and intermediate. Alternatively, the Regulation fails rational-basis review because there is no plausible, legitimate policy reason for denying medically necessary care to transgender people. Although DHS opted not to appeal the district court's ruling that the Regulation is unconstitutional, this Court should affirm that ruling because Division XX cannot be divorced from its intended purpose: reinstating the discriminatory Regulation.

Petitioners also cross-appeal three findings by the district court. *First*, the district court erred in concluding that Petitioners were obligated to assert their ICRA claims before the Commission. This Court has held that, in a case such as this one, where a discrimination claim is directed at the substance of an agency regulation,

rather than at a discretionary individual decision applying the regulation, review of the regulation is governed by the provisions of the Iowa Administrative Procedure Act ("APA"), not those of ICRA. Under section 17A.19 of the APA, Petitioners properly preserved their ICRA claims for review by the district court by first asserting them before DHS.

Second, the district court should have entered judgment in Petitioners' favor on Petitioners' ICRA claims. Because Division XX is unconstitutional, it is null and void. The preamendment version of section 216.7 of ICRA, protecting against the discriminatory denial of Medicaid coverage for gender-affirming surgery, therefore remains in effect. As recognized by this Court in *Good*, the Regulation violates the preamendment version of ICRA.

Third, the district court erred in denying Petitioners' request for attorney's fees. ICRA and the Iowa Equal Access to Justice Act ("EAJA") authorize fee-shifting in this case. ICRA—which, by its own terms, must be "broadly" construed—expressly allows fee-shifting. *See* Iowa Code §§ 216.15(9)(a)(8), 216.16(6), 216.18(1) (2022). In addition, EAJA section 625.29 expressly provides for fee-shifting in nonrulemaking cases under the APA in order to facilitate meritorious claims by private parties against unreasonable exercises of administrative authority, and none of EAJA's exclusions to fee-shifting apply here. Iowa Code § 625.29(1) (2022).

II. Factual Background

DHS's brief discusses the procedural history of this matter without addressing the undisputed evidentiary record on which the district court's judgment was based. A summary of that record is set forth below.

A. Standards of Care for Gender Dysphoria

Gender dysphoria is a serious medical condition codified in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition ("DSM-V"), and the International Statistical Classification of Diseases and Related Health Problems, Tenth Edition. (App. II 808, ¶ 12.) The criteria for diagnosing gender dysphoria are set forth in section 302.85 of DSM-V. (*Id*., ¶ 14.) *See Good*, 924 N.W.2d at 856 (noting that "[g]ender dysphoria is a diagnostic category in the . . . DSM-V" referring to "the distress that may accompany the incongruence between one's experienced or expressed gender and one's assigned gender").

If left untreated, gender dysphoria can lead to serious medical problems, including clinically significant psychological distress and dysfunction, debilitating depression, and, for some people without access to appropriate medical care, suicidality and death. (App. II 809, ¶ 15.)

The standards of care for treating gender dysphoria ("Standards of Care" or "Standards) are set forth in the World Professional Association of Transgender Health ("WPATH") Standards of Care for the Health of Transsexual, Transgender,

and Nonconforming People. Standards of Care, *available at* http://www.wpath.org/site_page.cfm?pk_association_webpage_menu=1351. (*Id.*, ¶ 16.) WPATH is a nonprofit interdisciplinary professional and educational organization devoted to transgender health. (App. II 807, ¶ 6.)

The Standards of Care are widely accepted, evidence-based, best-practice medical protocols that articulate professional consensus to guide health-care professionals in medically managing gender dysphoria by providing the parameters within which they may provide care to individuals with this condition. (App. II 809, ¶ 17.) The Standards are recognized as authoritative by the American Medical Association, the American Psychiatric Association, and the American Psychological Association, among others. (*Id.*, ¶ 16.)

For many transgender people, necessary treatment for gender dysphoria may require medical interventions to affirm their gender identity and help them transition from living in one gender to living in another. (App. II 809–10, ¶¶ 18–19.) This transition-related care may include hormone therapy, surgery (sometimes called "gender-confirmation surgery" or "sex-reassignment surgery"), and other medical services to align a transgender person's body with their gender identity. (*Id.*) *See Good*, 924 N.W.2d at 857 (summarizing "the accepted standards of medical care to alleviate gender dysphoria").

The treatment for each transgender person is individualized to fulfill that person's particular needs. (App. II 809–10, ¶¶ 16–19.) The Standards of Care for treating gender dysphoria address all these forms of medical treatment, including surgery to alter primary and secondary sex characteristics. (*Id*.)

By the mid-1990s, there was consensus within the medical community that surgery was the only effective treatment for many individuals with severe gender dysphoria. (App. II 812, ¶ 29; App. II 817, ¶ 54.) More than three decades of research confirms that surgery to modify primary and secondary sex characteristics and align gender identity with anatomy is therapeutic and is therefore effective treatment for gender dysphoria. (App. II 814, ¶ 40; App. II 817, ¶ 54.) For appropriately assessed severe gender-dysphoric patients, surgery is the only effective treatment. (App. II 818, ¶ 56.)

Health experts have rejected the myth that these treatments are "cosmetic" or "experimental" and have recognized that the treatments can provide safe and effective care for a serious health condition. (App. II 817, ¶ 54.) Indeed, leading medical groups, including the American Medical Association,[1] the American

[1] Resolution 122 (A–108), *available at* http://www.ama-assn.org/resources/doc/PolicyFinder/policyfiles/HnE/H-185.950.htm.

Psychological Association,[2] the American Academy of Family Physicians,[3] the American College of Obstetricians and Gynecologists,[4] the National Association of Social Workers,[5] and WPATH,[6] all agree that gender dysphoria is a serious medical condition, that treatment for gender dysphoria is medically necessary for many transgender people, and that insurers should provide coverage for treatment. (App. II 818, ¶ 57.)

B. Mr. Vasquez

Mr. Vasquez is a 54-year-old transgender man who has known he is male since his early childhood. (App. II 821, ¶¶ 1, 4.) Mr. Vasquez has expressed his male identity in various ways since the age of eight. (App. II 821, ¶ 4.) He was diagnosed with gender dysphoria in 2016. (App. II 822, ¶ 7.) In January 2016, he began hormone therapy. (*Id*.) Shortly after beginning hormone therapy, he began the

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[2] Position Statement on Access to Care for Transgender and Gender Variant Individuals (2012), *available at* www.psychiatry.org/File%20Library/Advocacy%20and20%Newsroom/Pos ition%20Statements/ps2012_TransgenderCare.pdf.

[3] Resolution No. 1004 (2012), *available at* http://www.aafp.org/dam/AAFP/documents/about_us/special_constituencies/2012 RCAR_Advocacy.pdf.

[4] Committee Opinion No. 512: Health Care for Transgender Individuals, *available at* http://www.ncfr.org/news/acog-releases-new-committee-opinion-transgender-persons.

[5] Transgender and Gender Identity Issues Policy Statement, *available at* http://www.socialworkers.org/da/da2008/finalvoting/documents/Transgender%202nd%20round%20-%20Clean.pdf.

[6] Clarification on Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage in the USA (2008), *available at* http://www.wpath.org/documents/Med%20Nec%20 on%202008%20Letterhead.pdf.

process of socially transitioning from presenting as female to presenting as male by using the pronouns "he," "him," and "his" and using men's restrooms in public places. (*Id*., ¶ 8.) This "social transition"—i.e., changing gender expression and role to live consistently with a person's gender identity—is one form of treatment for gender dysphoria. Standards of Care at 9–10, *available at* http://www.wpath.org/site _pagge .cfm?pk _association_webpage_menu =1351.

In May 2016, Mr. Vasquez legally changed his name, and amended his driver's license and social-security card, to reflect his male identity. (App. II 822, ¶ 10.) In September 2016, Mr. Vasquez underwent a double mastectomy, using a CareCredit card obtained for that purpose, to better align his body with his gender identity. (*Id*., ¶ 11.) In October 2016, Mr. Vasquez amended his birth certificate, and changed the gender markers on his identification documents, to reflect his male gender identity. (*Id*., ¶ 12.)

Mr. Vasquez has a long history of self-harm and suicidality stemming from depression caused by his gender dysphoria. (App. II 824, ¶ 26.) He is severely distressed with his genitalia, which does not align with his gender identity and exacerbates his depression. (App. II 822, ¶ 13.)

In or around August 2020, Mr. Vasquez began the process of seeking Medicaid coverage for gender-affirming surgery from his MCO, Amerigroup. (AR

339.) Mr. Vasquez, a participant in Iowa Medicaid, is eligible for Medicaid reimbursement. (App. II 823, ¶ 17.)

Mr. Vasquez's health-care providers have uniformly concluded that surgery is necessary to treat his gender dysphoria. Nicole Nisly ("Dr. Nisly") is Mr. Vasquez's primary-care physician. (App. II 776, ¶ 2.) She has treated Mr. Vasquez since May 2016. (*Id*.) In August 2020, she stated:

> In my professional medical opinion and judgment[,] the sex designation of [Mr. Vasquez] has been permanently changed. All of the treatments [he] received under my care were medically necessary, clinically appropriate, and in accord with the standards [of care]. [Mr. Vasquez] has also under[gone] gender affirming top surgery (mastectomy).
>
> Gender affirming bottom surgery is medically necessary to treat [Mr. Vasquez's] gender dysphoria and I support this decision and referral.

(App. II 779.)

Scott X. Fieker ("Mr. Fieker") is a clinical psychologist. (App. II 782, ¶ 2.) In August 2020, Mr. Fieker assessed Mr. Vasquez, stating:

> I have no hesitation in recommending [Mr. Vasquez] for the procedure he is requesting. It is my professional opinion as a Licensed Mental Health Counselor in the State of Iowa that he meets and exceeds the criteria as set forth by [WPATH].

(App. II 785.)

Amanda Goslin ("Ms. Goslin") is a clinical psychologist. (App. II 787, ¶ 2.) In August 2020, Ms. Goslin assessed Mr. Vasquez, stating:

> [Mr. Vasquez] has met the WPATH Standards for receiving gender reaffirming bottom surgery. He has persistent, well-documented gender

> dysphoria and his other mental health concerns are well controlled. Additionally, he has the capacity to make an informed decision and is over the age of 18. I believe that receiving gender reaffirming bottom surgery will help [Mr. Vasquez] to make significant progress in treating his gender dysphoria.

(App. II 791.)

Jacob Sandoval ("Mr. Sandoval") is a clinical psychologist. (App. II 794, ¶ 2.) In August 2020, Mr. Sandoval assessed Mr. Vasquez, stating:

> [Mr. Vasquez] has experienced marked gender dysphoria throughout his life. . . . [T]hese feelings increased after top surgery due to not feeling whole. [Mr. Vasquez] is over 18, is making an informed decision, and understands the risks and benefits of bottom surgery. It is my recommendation that [Mr. Vasquez] has access to receive bottom surgery and that this treatment would help his mood and dysphoria.

(App. II 798.)

Dr. Carol Daniels, PhD ("Dr. Daniels"), is a clinical psychologist. (App. II 801, ¶ 2.) In September 2020, Dr. Daniels assessed Mr. Vasquez, stating:

> I believe [Mr. Vasquez] to be capable of making an informed decision about undertaking surgery and that the next appropriate step for him is to undergo such surgery. In my belief, this will help him make significant progress for further treatment of his gender dysphoria. I see it as a vital quality of life and mental health issue for him, and I recommend [Mr.] Vasquez for gender reassignment/phalloplasty surgery.

(App. II 804.)

C. Ms. Covington

Ms. Covington is a 31-year-old transgender woman who has known she is female since her early childhood. (App. II 1569, ¶¶ 1, 4.) Ms. Covington has

expressed her female identity in various ways since the age of six. (*Id.*, ¶ 4.) In 2009, Ms. Covington began the process of socially transitioning from male to female by using the pronouns "she," "her," and "hers." (App. II 1570, ¶ 7.) In 2014, Ms. Covington legally changed her name to reflect her identity as a woman. (*Id.*, ¶ 8.) Ms. Covington has also changed the gender markers on her identification documents to reflect her female gender identity. (App. II 1571, ¶¶ 16–18.)

In January 2015, Ms. Covington was diagnosed with gender dysphoria and began receiving hormone therapy. (App. II 1570, ¶ 11.) Ms. Covington is severely distressed with her genitalia, which does not align with her gender identity and exacerbates her depression and anxiety. (App. II 1571, ¶ 14; App. II 1572, ¶ 19.)

In or around December 2020, Ms. Covington began the process of seeking Medicaid coverage for gender-affirming surgery from her MCO, Amerigroup. (App. II 1255.) Ms. Covington, a participant in Iowa Medicaid, is eligible for Medicaid reimbursement. (App. II 1572, ¶ 21.)

Ms. Covington's health-care providers have uniformly concluded that surgery is necessary to treat her gender dysphoria. Dr. Nicole Nisly is Ms. Covington's primary-care physician. (App. II 1534, ¶ 2.) She has treated Ms. Covington since 2015. (*Id.*, ¶ 3.) In January 2021, she stated:

> In my professional medical opinion and judgment the sex designation of [Ms.] Covington has been permanently changed. All of the treatments [Ms.] Covington received under my care were medically

> necessary, clinically appropriate, and in accord with the standards [of care].
>
> Gender affirming vaginoplasty surgery is medically necessary to treat [Ms. Covington's] gender dysphoria and I support this decision and referral.

(App. II 1537.)

David Drustrup ("Mr. Drustrup") is a clinical psychologist. (App. II 1540, ¶ 2.) In January 2021, Mr. Drustrup assessed Ms. Covington, stating:

> [Ms. Covington] has met the WPATH Standards for receiving gender reaffirming bottom surgery. She has persistent, well-documented gender dysphoria and her other mental health concerns are well controlled. Additionally, she has the capacity to make an informed decision and at the time of surgery, and at the time this letter was written, is over the age of 18. I believe that receiving gender reaffirming bottom surgery will help [Ms. Covington] make significant progress in treating her gender dysphoria.

(App. II 1545.)

Mary A. Ball ("Ms. Ball") is a clinical psychologist. (AR 610, ¶ 2.) In January 2021, Ms. Ball assessed Ms. Covington, stating:

> [Ms. Covington] has met the WPATH Standards for receiving gender reaffirming bottom surgery. She has persistent, well-documented gender dysphoria and her other mental health concerns are addressed. Additionally, she has the capacity to make an informed decision and is over the age of 18. I believe that receiving gender reaffirming bottom surgery will help [Ms. Covington] to make significant progress in treating her gender dysphoria.

(App. II 1547.)

III. Procedural History

A. Administrative Proceedings

Medicaid is a cooperative federal–state program in which the federal government helps state governments provide medical care to needy individuals. *TLC Home Health Care, LLC v. Iowa Dep't of Human Servs.*, 638 N.W.2d 708, 711 (Iowa 2002); *Madrid Home for the Aging v. Iowa Dep't of Human Servs.*, 557 N.W.2d 507, 511 (Iowa 1996). Individuals eligible for Iowa Medicaid include, but are not limited to, adults between the ages of 19 and 64 whose income is at or below 133 percent of the Federal Poverty Level, a measure of income issued every year by the United States Department of Health and Human Services. Iowa Dep't of Human Servs., *Who Receives Medicaid, available at* https://dhs.iowa.gov/ime/members/who-receives-medicaid.

On August 14, 2020, Mr. Vasquez, through his physician, submitted a request to Amerigroup seeking Medicaid preauthorization for expenses related to a phalloplasty necessary to treat his gender dysphoria. (App. II 346.) Five medical providers—a general-care physician and four clinical psychologists—concluded that the requested surgery is medically necessary. (App. II 160–74.) Despite the consensus of Mr. Vasquez's health-care providers, Amerigroup denied coverage for the surgery under the Regulation. (App. II 352, 527.) After Amerigroup denied Mr.

Vasquez's request, he initiated an internal appeal using Amerigroup's grievance procedures, which Amerigroup denied. (App. II 158.)

Mr. Vasquez subsequently appealed Amerigroup's decision to DHS and, at a hearing before an administrative-law judge ("ALJ"), presented unrebutted evidence that the surgical treatment he requested was medically necessary. (App. II 10, 703, 769.) Following the hearing, the ALJ issued a proposed decision affirming Amerigroup's decision. (App. II 76.) On further review, DHS's director adopted the ALJ's ruling as the agency's final decision regarding Mr. Vasquez's appeal. (App. II 773, 932.)

On December 3, 2020, Ms. Covington, through her physician, submitted a request to Amerigroup seeking Medicaid preauthorization for expenses related to a vaginoplasty necessary to treat her gender dysphoria. (App. II 1255.) Three medical providers—a general-care physician and two clinical psychologists—concluded that the requested surgery is medically necessary. (App. II 1533–552.) Despite the consensus of Ms. Covington's health-care providers, Amerigroup denied coverage for the surgery under the Regulation. (App. II 1274.) After Amerigroup denied Ms. Covington's request, she initiated an internal appeal using Amerigroup's grievance procedures, which Amerigroup denied. (App. II 1083, 1212.)

Ms. Covington subsequently appealed Amerigroup's decision to DHS and, at a hearing before an ALJ, presented unrebutted evidence that the surgical treatment

she requested was medically necessary. (App. II 1081, 1462, 1519–21.) Following the hearing, the ALJ issued a proposed decision affirming Amerigroup's decision. (App. II 1518.) On further review, DHS's director adopted the ALJ's ruling as the agency's final decision regarding Ms. Covington's appeal. (App. II 1665.)

As noted, neither Amerigroup nor DHS submitted any evidence contradicting the evidence presented by Mr. Vasquez or Ms. Covington. (App. II 10, 703, 769, 1081, 1462, 1519–21.) The evidence showing that the surgical procedures Mr. Vasquez and Ms. Covington requested are medically necessary is unrebutted. (*Id*.) So, too, is the evidence regarding the standards of care for gender dysphoria. (*Id*.)

B. The District Court

Mr. Vasquez and Ms. Covington timely filed separate judicial-review proceedings in the district court that were later consolidated. (App. I 5; App. I 363; App. I 4, 8/13/21 Order.) They alleged that DHS's decisions denying their requests for Medicaid coverage should be vacated because, in relevant part, (1) the Regulation, on its face, violates the Iowa Constitution's equal-protection guarantee (Count I), and (2) the Regulation violates ICRA's prohibition against gender-identity discrimination because Division XX, on its face and through discriminatory animus toward transgender people, violates the Iowa Constitution's equal-protection guarantee, and the preamendment version of section 216.7 of ICRA therefore remains in effect (Counts II & III). (App. I 5; App. I 3.)

The following rulings by the district court are relevant to DHS's appeal and Petitioners' cross-appeal:

- ***ICRA*:** On August 10, 2021, the district court dismissed Petitioners' ICRA claims on the basis that those claims were not asserted before the Commission but allowed Petitioners' equal-protection challenges to the constitutionality of Division XX to stand. (App. I 672–77.) The district court later denied Petitioners' motion to reconsider the dismissal of the ICRA claims. (App. I 738–41.)

- ***Division XX (Facial Challenge)*:** On November 19, 2021, the district court granted Petitioners' petitions for judicial review with respect to their challenges to the constitutionality of Division XX. The court found that, on its face, the Regulation violated the Iowa Constitution's equal-protection guarantee under either intermediate scrutiny or rational-basis review. (App. I 754–777, 795.)

- ***Division XX (Animus)*:** In the same order, the district court found that Petitioners had failed to prove that Division XX's enactment was "motivated by animus toward transgender people." (App. I 777–80.)

- ***The Regulation (Facial Challenge)*:** The district court also granted Petitioners' petitions for judicial review with respect to their challenges to the constitutionality of the Regulation. The court found that, on its face, the Regulation violated the Iowa Constitution's equal-protection guarantee under either intermediate scrutiny or rational-basis review. (*Id*. at 754–69, 783–87, 790–91, 795.)

- ***Attorney's Fees*:** Finally, the district court denied Petitioners' requests for attorney's fees. The court found that Petitioners could not recover fees under ICRA, because their ICRA claims were barred, and could not recover fees under EAJA, because their judicial-review actions arose from proceedings in which the role of the state was to determine their eligibility or entitlement

to a monetary benefit or its equivalent, and therefore were excluded from fee-shifting. (*Id*. at 793–95.)

ARGUMENT

PETITIONERS' RESPONSE TO DHS'S APPEAL

I. The district court had the authority to adjudicate Petitioners' challenges to the constitutionality of Division XX.

The issue whether the district court had the authority to adjudicate Petitioners' challenges to the constitutionality of Division XX is subject to de novo review and has been properly preserved for appeal. (Br. at 26.)

DHS argues that Petitioners should not have been allowed to challenge the constitutionality of Division XX because DHS did not base its decisions on Division XX. (Br. at 26–33.) DHS's argument disregards the plain language of section 17A.19(10)(a) of the APA and the grounds on which DHS relied to deny Petitioners' requests for Medicaid coverage. *See* Iowa Code § 17A.19(10)(a) (2022).

DHS concedes, as it must, that "if [its] decision or administrative rule had been based on a statute with an alleged constitutional defect, [Petitioners] could have challenged the constitutionality of that statute . . . ." (Br. at 27.) *See, e.g., Gartner v. Iowa Dep't of Pub. Health*, 830 N.W.2d 335, 354 (Iowa 2013) (addressing, in a judicial-review case, the constitutionality of a birth-certificate statute presuming parentage of male spouses in heterosexual marriages but not female spouses in lesbian marriages). Before DHS and the district court, Petitioners asserted that

DHS's decisions denying their requests for Medicaid coverage were based on Division XX, an unconstitutional statute.

Division XX amended ICRA with the sole purpose of allowing DHS and MCOs such as Amerigroup, as DHS's agents, to apply the Regulation to discriminate against transgender Iowans without violating ICRA. Division XX's intended effect of exempting state and local government units from ICRA's nondiscrimination protections for transgender Iowans seeking medically necessary care violates the Iowa Constitution's equal-protection guarantee, as discussed in further detail below.

Because Division XX is unconstitutional, the amendment to ICRA under which "state or local government unit[s] or tax-supported district[s]" are no longer required "to provide for sex reassignment surgery" or any surgical procedure "related to transsexualism [or] gender identity disorder" is null and void. *See* Iowa Code § 216.7(3) (2022). The preamendment version of section 216.7 of ICRA, protecting against the discriminatory denial of gender-affirming surgery, therefore remains in effect. *See State v. Zarate*, 908 N.W.2d 831, 844 (Iowa 2018) (holding that "[w]hen parts of a statute . . . are constitutionally valid, but other discrete and identifiable parts are infirm," a court will "leave the valid parts in force on the assumption that the legislature would have intended those provisions to stand alone"). As set forth in *Good*, ICRA's protections against gender-identity

discrimination prohibit the Regulation's categorical ban on Medicaid reimbursement for gender-affirming surgery. *Good*, 924 N.W.2d at 862–63.

DHS fails to acknowledge that, but for the enactment of Division XX, which amended ICRA, DHS's denials of coverage would have violated the version of ICRA that existed before Division XX was unconstitutionally signed into law. DHS's decisions were thus "based upon a provision of law"—i.e., Division XX—"that is unconstitutional on its face or as applied." Iowa Code § 17A.19(10)(a) (2022).

DHS contends that its "decision here wasn't based on any statutory mandate," but rather on its "Medicaid administrative rules." (Br. at 27.) But the two provisions at issue—Division XX and the Regulation—are interdependent, not mutually exclusive. As amended by Division XX, ICRA's protections against discrimination in public accommodations no longer "require any state or local government unit or tax-supported district to provide for sex reassignment surgery" or any surgical procedure "related to transsexualism [or] gender identity disorder." Iowa Code § 216.7(3) (2022). This is so regardless of (1) an individual's eligibility for Medicaid coverage or (2) the medical necessity of the requested procedure. In effect, Division XX reinstated the Regulation, which expressly prohibits Medicaid coverage for gender-affirming surgery, since, under Division XX, DHS can—and, as illustrated

by the administrative proceedings in this case, will—apply the Regulation as written, notwithstanding this Court's decision in *Good*. *Good*, 924 N.W.2d at 862–63.

For DHS to claim, as it now does, that its denials of Petitioners' requests for Medicaid coverage were not "based upon" Division XX, but rather on the Regulation, ignores that the latter would no longer be in effect without the former. Because of the *Good* ruling, Division XX is a necessary component of any decision denying Medicaid coverage for gender-affirming surgery based on the Regulation. Petitioners therefore properly challenged the constitutionality of Division XX, which amended ICRA, and properly challenged the legality of the Regulation under the preamendment version of ICRA.

DHS mistakenly suggests that its lack of "jurisdiction" to decide the constitutionality of Division XX supports finding that its denials of Petitioners' requests for coverage were not "based upon" Division XX. (Br. at 30.) This argument conflates two separate concepts: (1) the underlying grounds for the denials and (2) the scope of DHS's authority to review the grounds for the denials in administrative-level contested cases. DHS's lack of authority to declare Division XX unconstitutional does not mean that, in the first instance, DHS's decisions were not "based upon" Division XX. On the contrary, as both ALJs recognized, and as DHS acknowledged by adopting the ALJs' decisions, the legislature's amendment to ICRA was "a legislative refutation to the *Good* decision" that "prevent[ed] [the

ALJs]," or DHS, "from relying on *Good*." (*See* App. II 59, 736–37; App. II 770, 932.) In other words, DHS—through its MCO Amerigroup and, ultimately, through its director—was constrained to follow the law as written, and, as written, Division XX required DHS to apply the Regulation.

This Court's decision in *Gartner*, which is analogous to this case, illustrates the flaws in DHS's position. In *Gartner*, the plaintiffs asked the Iowa Department of Public Health ("DPH") to issue a birth certificate recognizing both spouses in a lesbian marriage as the parents of a child born into the marriage. *Gartner*, 830 N.W.2d at 341. Relying on section 144.23(1) of the Iowa Code, DPH "refused to place the name of the nonbirthing spouse in a lesbian marriage on the birth certificate without the spouse first adopting the child." *Id*. at 341–42. On judicial review, the district court interpreted the presumption-of-parentage provision of Iowa's birth-certificate statute, codified at section 144.13(2) of the Iowa Code, to require DPH to amend the birth certificate. *Id*. at 342. On appeal, this Court affirmed the district court's judgment. *Id*. at 350–54. The Court disagreed with the district court's interpretation of section 144.13(2) but found that the statute, as drafted, violated the Iowa Constitution's equal-protection guarantee. *Id*.

In *Gartner*, as in this case, the constitutionality of the statute was properly adjudicated within the context of a chapter 17A judicial-review proceeding based on section 17A.19(10)(a) of the APA. *Id*. at 344. It was immaterial that DPH had no

authority to decide the constitutionality of section 144.13(2). If DHS's interpretation of section 17A.19(10)(a) in this case were correct, then *Gartner* would not have been decided as it was. Moreover, if a court's authority to adjudicate the constitutionality of a statute in a section 17A.19(10)(a) proceeding were dependent an agency's authority to do so, then no court would ever have jurisdiction to declare a statute unconstitutional under section 17A.19(10)(a), given the lack of corresponding agency authority. This result is inconsistent with the plain text of section 17A.19(10)(a).

DHS also erroneously invokes the principle of "narrow" construction to suggest that the "based upon" language in section 17A.19(10)(a) of the APA did not authorize the district court to review Petitioners' challenges to the constitutionality of Division XX. (Br. at 31.) This argument has no merit. *First*, DHS does not cite any authorities that actually support "narrowly" interpreting section 17A.19(10)(a), and there is no such authority. On the contrary, chapter 17A, which was adopted to make challenging agency decisions that violate rights easier, not harder, must be "construed broadly to effectuate its purposes." *See* Iowa Code §§ 17A.1(3), 17A.23(2).

Second, Section 17A.19(10)(a) must be interpreted in accordance with its plain language. *Univ. of Iowa v. Dunbar*, 590 N.W.2d 510, 511 (Iowa 1999); *Carolan v. Hill*, 553 N.W.2d 882, 887 (Iowa 1996). Here, the plain language

warrants concluding that DHS's decisions were "based upon a provision of law"—i.e., Division XX—"that is unconstitutional on its face or as applied." Iowa Code § 17A.19(10)(a) (2022). Indeed, the cases cited by DHS support the proposition that a court can adjudicate the constitutionality of a statute in a judicial-review action as long as the agency's decision implicates the statute in question, as is the case here. (Br. at 31–32 (collecting cases).)

Third, the "structure of chapter 17A" does not support DHS's "narrow interpretation" of section 17A.19(10)(a). (*Id*. at 32–33.) Although DHS claims that declaring Division XX unconstitutional goes "beyond any appropriate relief from the [DHS] action under review" (*id*. at 32), the APA expressly states that a "court shall reverse, modify, or grant ***other appropriate relief*** from agency action, ***equitable or legal and including declaratory relief*** . . . ." Iowa Code § 17A.19(10) (2022) (emphasis added). The same APA section then specifically sets forth the grounds pursued by Petitioners in their petitions—including but not limited to APA section 17A.19(10)(a)—as bases for a district court's jurisdiction to grant those forms of relief. *Id*. The "structure" of the APA thus specifically authorized the district court to grant the declaratory and injunctive relief Petitioners sought with respect to Division XX.

Finally, the doctrine of constitutional avoidance does not support "narrowly" interpreting section 17A.19(10)(a). (Br. at 33.) DHS appears to suggest that, because

its denials of Petitioners' requests for Medicaid coverage were not based on Division XX, it was unnecessary for the district court to decide Division XX's constitutionality. (*Id.*) This, of course, simply begs the question whether DHS's decisions were, in fact, "based upon" Division XX. As discussed above, they clearly were, and the district court had the authority to declare Division XX unconstitutional in the context of Petitioners' chapter 17A actions.

DHS's argument is equally flawed if its position is that the district court should only have addressed the constitutionality of the Regulation, not the constitutionality of Division XX. At the time the district court decided Petitioners' petitions for judicial review, DHS had not yet conceded that the Regulation violated equal protection, as it now does before this Court. That issue remained in dispute. In addition, even with the Regulation invalidated, DHS could still attempt to invoke Division XX, standing alone, to deny Medicaid coverage for gender-affirming surgery, given that Division XX expressly states that ICRA "shall not require any state or local government unit or tax-supported district to provide for sex reassignment surgery" or any surgical procedure "related to transsexualism [or] gender identity disorder." Iowa Code § 216.7(3) (2022). The doctrine of constitutional avoidance did not warrant forgoing review of the constitutionality of Division XX, either independently or as a limitation on the scope of section 17A.19(10)(a) of the APA.

II. Division XX violates equal protection.

The Iowa Constitution contains a two-part equal-protection guarantee. Iowa Const. art. I, §§ 1, 6. Although Iowa courts look to federal courts' interpretation of the U.S. Constitution in construing parallel provisions of the Iowa Constitution, they "jealously reserve the right to develop an independent framework under the Iowa Constitution." *NextEra Energy Res., LLC v. Iowa Utilities Bd.*, 815 N.W.2d 30, 45 (Iowa 2012). This is because, as this Court recently reaffirmed, the rights guaranteed to individuals under the Iowa Constitution have critical, independent importance, and the courts play a crucial role in protecting those rights. *Godfrey v. State*, 898 N.W.2d 844, 864–65 (Iowa 2017).

The district court correctly concluded that Division XX violates the Iowa Constitution's equal-protection guarantee. (App. I 752–77.) Division XX facially discriminates against similarly situated Iowans without an adequate constitutional justification. It also was motivated by discriminatory animus toward transgender people. The issue whether Division XX is unconstitutional is subject to de novo review and has been properly preserved for appeal. (Br. at 26.)

A. Division XX is facially discriminatory.

1. Transgender and nontransgender Iowans are similarly situated for equal-protection purposes.

The Iowa Constitution's equal-protection guarantee is essentially a directive that all persons similarly situated should be treated alike under the law. *See Gartner*,

830 N.W.2d at 351; *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). It requires "that laws treat alike all people who are similarly situated with respect to the legitimate purposes of the law." *Varnum v. Brien*, 763 N.W.2d 862, 882 (Iowa 2009) (internal quotation marks omitted); *Bowers v. Polk Cnty. Bd. of Supervisors*, 638 N.W.2d 682, 689 (Iowa 2002).

The purpose of Medicaid is to "'furnish medical care to needy individuals.'" *TLC*, 638 N.W.2d at 711; *Madrid*, 557 N.W.2d at 511. Transgender and nontransgender Iowans eligible for Medicaid—the public accommodation that administers the publicly financed health-care insurance affected by the Regulation—are similarly situated for equal-protection purposes. (App. I 754–57.) They are the same in all legally relevant ways because Medicaid recipients, transgender or not, share a financial need for medically necessary treatment. *See In re Estate of Melby*, 841 N.W.2d 867, 875 (Iowa 2014) ("The Medicaid program was designed to serve individuals and families lacking adequate funds for basic health services. . . ."). The district court correctly found this to be true, and DHS does not challenge this finding on appeal. (App. I 754–57; Br. at 34–41.)

Instead, DHS argues that the district court's "interpretation of [Division XX] as a statutory prohibition on providing gender-affirming surgery" was "wrong" because Division XX "only limit[s] the scope of [ICRA's] requirements" and does "not prohibit[] *any* provision of surgical procedures." (Br. at 38 (emphasis added).)

Put differently, DHS contends that Division XX does not discriminate against transgender people.

DHS's argument fundamentally misconstrues the plain language of Division XX and the relationship between Division XX and the Regulation. *First*, on its face, Division XX classifies on the basis of transgender status by exempting only transgender people from the normal nondiscrimination protections and remedies that apply to all Iowans under ICRA with respect to Medicaid coverage. The statute expressly references "sex reassignment surgery" and surgical procedures related to "transsexualism" and "gender identity disorder." Iowa Code § 216.7(3) (2022). Transgender people are the only individuals who have a medical need for "sex reassignment surgery" and surgical procedures related to "transsexualism" or "gender identity disorder," the procedures covered by Division XX. (*See* App. II 818, ¶ 56) (noting that, for appropriately assessed severe gender-dysphoric patients, surgery is the only effective treatment).) Indeed, DHS tacitly concedes that Division XX facially discriminates against transgender people by suggesting that the legislature could have responded to *Good* by adopting a more generalized measure, such as "clarifying [that] Medicaid [i]sn't a public accommodation—removing all statutory civil rights protections ***for any protected class***." (Br. at 35 (emphasis added).)

Aside from its current carve-out for gender-affirming surgery, ICRA prohibits the state from discriminating against nontransgender and transgender Medicaid beneficiaries alike based on race, sex, gender identity, and religion. The statute states, without limitation, that "[i]t shall be an unfair or discriminatory practice for any . . . employee or agent [of any public accommodation] . . . [t]o refuse or deny ***to any person*** because of race, creed, color, sex, sexual orientation, gender identity, national origin, religion, or disability the accommodations, advantages, facilities, services or privileges thereof, or otherwise to discriminate against any person because of [those characteristics] in the furnishing of such accommodations, advantages, facilities, services or privileges." Iowa Code § 216.7(1)(a) (2022) (emphasis added).

If DHS were to provide some type of Medicaid coverage to transgender people that it did not provide to nontransgender people—such as, for example, coverage for counseling—then this would violate ICRA's prohibition against gender-identity discrimination. The only exception to nondiscrimination coverage under ICRA, based on Division XX, is for transgender Iowans who have a medical need for gender-affirming surgery. *See* Iowa Code § 216.7(3) (2022). Division XX thus impermissibly targets transgender people for disfavored status in Medicaid and under ICRA.

Second, Division XX restored the discriminatory Regulation struck down in *Good*. In *Good*, the Court concluded that "expressly exclud[ing] Iowa Medicaid coverage for gender-affirming surgery specifically because this surgery treats gender dysphoria of transgender individuals" constitutes unlawful discrimination under ICRA. *Good*, 924 N.W.2d at 862–63. Division XX, which amends ICRA, states that the public-accommodation provisions of ICRA "***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." Iowa Code § 216.7(3) (2022) (emphasis added). This amendment reinstated the Regulation.

Petitioners' challenges to the Regulation were thoroughly briefed below. (Pet. Br. at 23–43; Reply at 8–30.) The district court adopted Petitioners' equal-protection analysis and declared the Regulation unconstitutional. (App. I 783–91.) DHS does not—and cannot—challenge that analysis. (Br. at 25.)

A regulation that is facially unconstitutional "is unconstitutional in all its applications." *Honomichl v. Valley View Swine, LLC*, 914 N.W.2d 223, 231 (Iowa 2018). Here, the Regulation facially discriminates against transgender Medicaid recipients by specifically authorizing the discriminatory denial of medically necessary gender-affirming surgery. *See* Iowa Admin. Code r. 441-78.1(4) (2022)

(excluding coverage for "[p]rocedures related to transsexualism . . . [or] gender identity disorders" and "[s]urgeries for the purposes of sex reassignment"). Put differently, despite medical necessity, the Regulation lets the state discriminate against transgender Medicaid recipients by denying them health care based on nothing more than the fact that they are transgender.

This is beyond dispute, as illustrated by this Court's decision in *Good*. In *Good*, the Court held that the Regulation's plain language violates ICRA's prohibition against gender-identity discrimination. *Good*, 924 N.W.2d at 862. The Court found that the record did "not support . . . DHS's position that [the Regulation] is nondiscriminatory because its exclusion of coverage for gender-affirming surgical procedures encompasses the broader category of 'cosmetic, reconstructive, or plastic surgery' that is 'performed primarily for psychological purposes.'" *Id.* at 862. The Court emphasized that "DHS expressly denied [the plaintiffs] coverage for their surgical procedures because they were 'related to transsexualism . . . [or] gender identity disorders' and 'for the purpose of sex reassignment.'" *Id.* The Court also emphasized that the Regulation "authorize[d] payment for some cosmetic, reconstructive, and plastic surgeries that serve psychological purposes" yet "prohibit[ed] coverage" for the "same" procedures if those procedures were requested by a transgender individual. *Id.* For these reasons, the Regulation was discriminatory under ICRA.

The Court also noted that "the history behind" the Regulation supported its holding. *Id*. Many years ago, DHS "had an unwritten policy of excluding sex reassignment surgeries from Medicaid coverage based on Medicaid's coverage limitations on 'cosmetic surgery' and 'mental diseases." *Id*. Then, in 1980, the United States Court of Appeals for the Eighth Circuit held that this "informal policy" was improper. *Id*. After the Eight Circuit's decision, DHS amended the Regulation "to clarify that [it] excluded Medicaid coverage for 'sex reassignment procedures' and 'gender identity disorders.'" *Id*. Based on this history, the Court concluded that the Regulation "expressly excluded Iowa Medicaid coverage for gender-affirming surgery specifically because this surgery treats gender dysphoria of transgender individuals." *Id*.

As Petitioners explained to the district court, and as the district court agreed, the Regulation's categorical ban on gender-affirming surgery is not constitutionally justified. (App. I 783–91.) There is no compelling or important government interest furthered by covering surgical treatment for nontransgender Medicaid participants but excluding coverage for transgender Medicaid participants where the treatment is a medically necessary part of the latter group's gender-affirming care. (App. I 333–35; App. I 623–27.) As a result, the Regulation fails heightened scrutiny, both strict and intermediate. (App. I 333–35; App. I 623–27.) Alternatively, the Regulation fails

rational-basis review because there is no plausible policy reason for denying medically necessary care to transgender people. (App. I 35–39; App. I 627–29.)

By its own terms, Division XX reinstated the discriminatory, antitransgender classification set forth in the Regulation. The fact that Division XX does not mention the Regulation by name or number is immaterial. *Cf. Johnson v. New York*, 49 F.3d 75, 78–79 (2d Cir.1995) (employment policy discriminated based on age, even though it did not mention age, where it incorporated another policy that discriminated based on age); *Erie Cnty. Retirees Ass'n v. Cnty. of Erie, Pa.*, 220 F.3d 193, 211 (3d Cir.2000) (same).

This Court's decision in *Varnum* further underscores the discriminatory nature of Division XX. There, the "benefit denied by the marriage statute—the status of civil marriage for same-sex couples—[was] so closely correlated with being homosexual as to make it apparent the law [was] targeted at gay and lesbian people as a class." *Varnum*, 763 N.W.2d 862 at 885 (internal quotation marks omitted). Similarly, here, surgical treatment for gender dysphoria "is so closely correlated with being [transgender] as to make it apparent" that the discrimination specifically authorized by Division XX, which permits denying this treatment, "is targeted at [transgender] people as a class." *Id.* (internal quotation marks omitted). As in *Varnum*, Division XX creates a facially discriminatory classification that applies to similarly situated people.

2. Division XX is not constitutionally justified.

Contrary to DHS's assertions (Br. at 41 n. 3), the appropriate level of scrutiny for the antitransgender classification in Division XX is squarely before the Court in this case, given that Division XX facially discriminates against transgender Iowans who rely on Medicaid, who DHS now concedes are similarly situated to nontransgender Iowans who rely on Medicaid. This Court has not decided what level of scrutiny applies to classifications that disfavor transgender people. Regardless, Division XX fails both heightened scrutiny and rational-basis review.

a. Division XX fails heightened scrutiny.

The district court correctly concluded that the Regulation fails heightened scrutiny. (App. I 757–77.) This is true under both strict and intermediate scrutiny.

i. Iowa's four-factor test for ascertaining the appropriate level of equal-protection scrutiny mandates applying heightened scrutiny.

The highest and most probing level of scrutiny under the Iowa Constitution—strict scrutiny—applies to classifications based on race, alienage, or national origin and those affecting fundamental rights. *Varnum*, 763 N.W.2d at 880; *Sherman v. Pella Corp.*, 576 N.W.2d 312, 317 (Iowa 1998). Under this approach, such classifications are presumptively invalid and must be "narrowly tailored to serve a compelling state interest." *In re S.A.J.B.*, 679 N.W.2d 645, 649 (Iowa 2004).

A middle level of scrutiny called "intermediate scrutiny" exists between rational-basis review—discussed below—and strict scrutiny. *Varnum*, 763 N.W.2d at 880. Intermediate scrutiny, like strict scrutiny, presumes that classifications are invalid, requiring a party seeking to uphold a classification to demonstrate that it is "substantially related" to achieving an "important governmental objective[]." *Sherman*, 576 N.W.2d at 317 (internal quotation marks omitted). The justification for the classification must also be "genuine, not hypothesized or invented *post hoc* in response to litigation," and must not depend on "overbroad generalizations." *United States v. Virginia*, 518 U.S. 515, 533 (1996). This Court's decisions confirm that, at a minimum, intermediate scrutiny applies to classifications based on gender, illegitimacy, and sexual orientation. *Varnum*, 763 N.W.2d at 895–96; *NextEra*, 815 N.W.2d at 46.

Iowa courts apply a four-factor test to determine the appropriate level of scrutiny under the Iowa Constitution's equal-protection guarantee. *Varnum*, 763 N.W.2d at 886–87. The factors are "(1) the history of invidious discrimination against the class burdened by [a particular classification]; (2) whether the characteristics that distinguish the class indicate a typical class member's ability to contribute to society; (3) whether the distinguishing characteristic is immutable or beyond the class members' control; and (4) the political power of the subject class." *Id.* at 887–88.

In *Varnum*, the Court cautioned against using a "rigid formula" to determine the appropriate level of equal-protection scrutiny and refused "to view all the factors as elements or as individually demanding a certain weight in each case." *Id*. at 886–89. Although no single factor is dispositive, the first two "have been critical to the analysis and could be considered as prerequisites to concluding a group is a suspect or quasi-suspect class." *Id*. at 889. The last two "supplement the analysis as a means to discern whether a need for heightened scrutiny exists" beyond rational basis. *Id*.

The four-factor *Varnum* test mandates applying *at least* intermediate scrutiny to classifications that discriminate against transgender Iowans.

(a) Factor one, the history of invidious discrimination against transgender people, supports heightened scrutiny.

In *Varnum*, the Court relied on national statistics, case law from other jurisdictions, and other sources to find that lesbian and gay individuals have experienced a history of invidious discrimination and prejudice. *Varnum*, 763 N.W.2d at 889–90. The Iowa legislature's enactment of several laws to protect individuals based on sexual orientation was critical to the Court's reasoning in *Varnum*, particularly the legislature's decision to add sexual orientation to ICRA as a protected class in 2007. *Id*. at 889–91. These enactments, including laws to counter bullying and harassment in schools and prohibit discrimination in credit, education, employment, housing, and public accommodations, demonstrated legislative

recognition of the need to remedy historical sexual-orientation-based discrimination. *Id*. at 890.

In 2007, like sexual orientation, gender identity was added as a protected class to both ICRA and the Iowa Anti-Bullying and Anti-Harassment Act. Iowa Code § 216.7(1)(a) (2022); Iowa Code § 280.28(2)(c) (2022). Like discrimination based on sexual orientation, discrimination based on transgender status has been extensively documented. S.E. James, et al., *The Report of the 2015 U.S. Transgender Survey*, Washington, DC, National Center for Transgender Equality (2016), *available at* https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf ("Transgender Survey"). Published in 2016, the Transgender Survey describes the discrimination, harassment, and even violence that transgender people encounter at school, in the workplace, when trying to find a place to live, during encounters with police, in doctors' offices and emergency rooms, at the hands of service providers and businesses, and in other aspects of life. *Id.*

In Iowa, widespread discrimination against transgender people has been documented by Professor Len Sandler and the University of Iowa College of Law's Rainbow Health Clinic. Len Sandler, *Where Do I Fit In? A Snapshot of Transgender Discrimination in Iowa* (2016), *available at* https://law.uiowa.edu/sites/law.uiowa.edu/files/202106/Where%20Do%20I%20Fit%20In%20--%20A%20Snapshot%20

of%20Transgender%20Discrimination%20June%202016%20Public%20Release.pdf (the "Rainbow Health Clinic Report").

Transgender people nationally and in Iowa continue to face discrimination. To the extent they have seen progress in protecting their rights, there is considerable backlash against that progress—including, unfortunately, through discriminatory legislation introduced in a recent Iowa General Assembly. *See Trump's Record of Action Against Transgender People*, National Center for Transgender Equality, *available at* https://transequality.org/the-discrimination-administration; Sarah Tisinger, *Branstad Calls Obama's Transgender Policy 'Blackmail,'* WQAD (May 18, 2016), *available at* https://wqad.com/2016/05/18/branstad-calls-obamas-transgender-bathroom-policy-blackmail; Jeremy W. Peters, et al., *Trump Rescinds Rules on Bathrooms for Transgender Students*, N.Y. Times (Feb. 22, 2017), *available at* https://www.nytimes.com/2017/02/22/u2/politics/devos-sessions-transgender-students-rights.html; Brianne Pfannenstiel et al., *Transgender 'Bathroom Bill' Introduced in Iowa House, Though Support Lags*, Des Moines Register (Jan. 31, 2018), *available at* https://www.desmoinesregister.com/story/news/politics/2018/01/31/transgender-bathroom-bill-iowa-lgbtq/1077963001; Iowa H.B. 2164, 87 Gen. Assem. (Jan. 31, 2018) (proposed bill to deprive transgender students in Iowa of access to boys' and girls' restrooms consistent with their gender identity); Lee Rood, *Nursing Facility Doors Slam Shut for Transgender Iowan*, Des Moines Register (May 18,

2016), *available at* https://www.desmoinesregister.com/story/news/investigations/readerswatchdog/2016/05/18/nursing-facility-doors-slam-shut-transgender-iowan/84490426.

A number of these instances of discrimination against transgender people parallel examples cited in *Varnum*. *Compare Varnum*, 763 N.W.2d at 889 (describing ban on gay and lesbian individuals serving in the military as evidence of history of invidious discrimination) *with* Abby Philip, et al., *Trump Announces That He Will Ban Transgender People from Serving in the Military*, Wash. Post (July 26, 2017), *available at* https://www.washingtonpost.com/world/national-security/trump-announces-that-he-will-ban-transgender-people-from-serving-in-the-military/2017/07/26/6415371e-723a-11e7-803f-a6c989606ac7_story.html?utm_term=.0973fb923c58.

Among the worst and most recent examples of animus against transgender people in Iowa is Division XX, which intentionally and facially discriminates against transgender Iowans by stripping them of the right under ICRA to nondiscrimination in Medicaid notwithstanding this Court's decision in *Good*. Legislators' comments in debating Division XX, discussed below, further show the profound animus faced by transgender Iowans. These examples illustrate the long, troubling history of invidious discrimination against transgender people in Iowa and elsewhere. *Varnum*, 763 N.W.2d at 889–90.

(b) Factor two, the relationship between transgender status and the ability to contribute to society, supports heightened scrutiny.

The second *Varnum* factor examines whether the class members' characteristics are related in any way to their ability to contribute to society. *Varnum*, 763 N.W.2d at 890. A person's gender identity or transgender status is irrelevant to the person's ability to contribute to society. The fact that the legislature previously outlawed discrimination based on gender identity shows that it recognized transgender Iowans' ability to contribute to society. *Compare id*. at 891 (finding that the legislature's prohibition against sexual-orientation discrimination sets forth "the public policy . . . that sexual orientation is not relevant to a person's ability to contribute to a number of societal institutions") *with* Iowa Code § 216.7(1) (2022) (barring discrimination based on "sexual orientation [or] gender identity").

Letters that Iowa corporations submitted to the Commission in support of the 2007 ICRA amendments show the same. Rainbow Health Clinic Report at 10. Those letters attest to the need for a law protecting LGBTQ Iowans against discrimination, illustrating the high premium Iowa employers place on their LGBTQ employees. *Id*.

In addition, the record includes unrebutted expert testimony that "[m]edical science recognizes that transgender people represent a normal variation of the diverse human population" and that "transgender people are fully capable of leading healthy, happy and productive lives." (App. II 54, ¶ 34.) "Being transgender does

not affect a person's ability to be a good employee, parent, or citizen." (App. II 55, ¶ 39.)

Consistent with *Varnum*, these sources support a finding that gender identity or transgender status, like sexual orientation, has no bearing on a person's ability to contribute to society. *Varnum*, 763 N.W.2d at 890.

(c) Factor three, the immutability of transgender status, supports heightened scrutiny.

The third *Varnum* factor is satisfied when a trait is "so central to a person's identity that it would be abhorrent for the government to penalize a person for refusing to change [it]." *Varnum*, 763 N.W.2d at 893 (internal quotation marks omitted).

Gender identity, like sexual orientation, is a trait central to a person's identity. (App. II 808–09, ¶¶ 9–11.) The WPATH Standards of Care and other medical literature in the record demonstrate that gender identity is not subject to change through outside influence. (App. II 810–14, ¶¶ 20–38.) Gender identity is biologically based, innate or fixed at a very early age, and cannot be altered. (AR 813–14, ¶¶ 34–38.) As noted in the Standards of Care, "[t]reatment aimed at trying to change a person's gender identity and expression to become more congruent with sex assigned at birth has been attempted in the past without success . . . . Such treatment is no longer considered ethical." Standards of Care at 16, *available at*

https://www.wpath.org/media.cms/Documents/SOC%20v7/SOC%20V7_English.pdf.

In *Good*, DHS did not dispute the immutability of transgender status. *Good v. Dep't of Human Servs.*, No. CVCV054956, at *25 (Polk Cnty. Dist. Ct. June 6, 2018) (stating that DHS "d[id] not refute this issue"). Nor did it actually do so in this case, where the evidence of immutability is unrebutted. (App. II 810–14, ¶¶ 20–38; App. II 813–14, ¶¶ 34–38.) Instead, before the district court, DHS relied on the U.S. Supreme Court's opinion in *Cleburne* for the proposition that courts should not apply heightened scrutiny "where individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement." (DHS Resp. at 18 (internal quotation marks omitted).)

DHS's reliance on *Cleburne* is problematic for two reasons. *First*, there is no indication that the U.S. Supreme Court would place transgender people in the category of litigants addressed in *Cleburne*, which dealt with a classification based on intellectual disability. *Cleburne*, 473 U.S. at 435. To the contrary, the Court recently declined to a hear a case in which the Fourth Circuit expressly held that "transgender people constitute a discrete group with immutable characteristics." *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 612 (4th Cir. 2020), *cert. denied sub nom. Gloucester Cnty. Sch. Bd. v. Grimm*, No. 20–116, 2021 WL 2637992 (U.S. June 28, 2021).

Second, although DHS tried to tether the extremely broad standard it derived from *Cleburne* to *Varnum*, the language on which DHS relied does not appear anywhere in the *Varnum* opinion and is not one of the *Varnum* factors. *Varnum*, 763 N.W.2d at 887–88. Under *Varnum*, immutability hinges on whether a trait is "so central to a person's identity that it would be abhorrent for the government to penalize a person for refusing to change [it]." *Id*. at 893 (internal quotation marks omitted). The Court in *Varnum* concluded that sexual orientation met this standard. *Id*.

Gender identity, like sexual orientation, is a trait "central to a person's identity." *Id*. In *Good*, the district court acknowledged that "a person's gender identity is developed in early childhood, has a strong biological basis, cannot be altered, and is not subject to change through outside influence." *Good*, No. CVCV054956, at *25. The same evidence that was before district court in *Good* was before the district court in this case, where it found that there was "nothing in the record to rebut" the evidence of immutability presented by Petitioners. (App. II 810–14, ¶¶ 20–38; App. II 813–14, ¶¶ 34–38; App. I 766.)

Based on these considerations, the third *Varnum* factor supports applying heightened scrutiny.

(d) Factor four, the political powerlessness of transgender people, supports heightened scrutiny.

The last *Varnum* factor examines the historical political powerlessness of the class in question. *Varnum*, 763 N.W.2d at 887–88. The "touchstone" of this analysis is whether a group "lacks sufficient political strength to bring a prompt end to . . . prejudice and discrimination through traditional political means." *Id*. at 894 (internal quotation marks omitted). "Absolute political powerlessness" is not required for a class to be subject to intermediate scrutiny. *Id*. For example, "females enjoyed at least some measure of political power when the Supreme Court first heightened its scrutiny of gender classifications." *Id*.

In addition, "a group's current political powerlessness is not a prerequisite to enhanced judicial protection." *Id*. "[I]f a group's *current* political powerlessness [were] a prerequisite to a characteristic's being considered a constitutionally suspect basis for differential treatment, it would be impossible to justify the numerous decisions that continue to treat sex, race, and religion as suspect classifications" in the face of growing political power for women, racial minorities, and others. *Id*. (emphasis in original) (internal quotation marks omitted). As a result, increased political standing or power does not prevent a court from applying heightened scrutiny.

Transgender Iowans are politically weak because of the community's small population size and the enduring societal prejudices against transgender people. *Id*. (internal quotation marks omitted). A 2016 study by the Williams Institute estimates that just 0.31 percent of Iowans identify as transgender. Andrew R. Flores, et al., *How Many Adults Identify as Transgender in the United States?*, Williams Institute (June 2016), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf.

Transgender people face staggering rates of poverty and homelessness. Nearly one-third of transgender people fall below the poverty line, more than twice the rate of the general US population. Transgender Survey at 5. Nearly one third of transgender people have experienced homelessness. *Id.*

Transgender people also face barriers to political representation. *See* Philip E. Jones, et al., *Explaining Public Opinion Toward Transgender People, Rights, and Candidates*, 82 Pub. Opinion Q. 252, 265 (Summer 2018), *available at* https://academic.oup.com/poq/article/82/2/252/4996117 (finding, in a randomized experiment, that nominating a transgender political candidate reduced the proportion of respondents who would vote for their own party's candidate from 68 percent to 37 percent).

In the district court, DHS argued that the Iowa legislature has, through various statutes, done enough to address discrimination based on gender identity to negate

any "continuing antipathy or prejudice" toward transgender people. (DHS Resp. at 18 (internal quotation marks omitted).) This is not the relevant standard. Under *Varnum*, political powerlessness is gauged based on whether a group "lacks sufficient political strength to bring a prompt end to . . . prejudice and discrimination through traditional political means." *Varnum*, 763 N.W.2d at 894 (internal quotation marks omitted). Oddly, the language on which DHS focused, which again comes from *Cleburne*, does appear in *Varnum*, but in relation to evaluating a group's history of invidious discrimination, a factor DHS concedes has been met in this case. *Id*. at 763 N.W.2d at 887 n.12 (quoting *Cleburne*).

Under the correct standard, it is obvious that transgender Iowans remain politically weak, if not "powerless," because of the community's small population size and the enduring societal prejudices against transgender people. *Id*. at 894. (internal quotation marks omitted). The statistical evidence Petitioners cited in support of this position remains unrebutted. (App. I 767–68.) Moreover, DHS fails to address two glaring examples that prove Petitioners' point in a very immediate way: the Regulation and Division XX.

As the district court noted in *Good*, "the Regulation itself has been revised multiple times over the years without any change to its prohibition on sex reassignment surgeries." *Good*, No. CVCV054956, at *25. The political-powerlessness factor of the *Varnum* analysis thus "weighs in favor of finding

transgender individuals to be a quasi-suspect class, given their clear inability to reverse this legislative burden through traditional political means." *Id*. Regrettably, after *Good* was decided, the legislature further underscored the district court's point by enacting Division XX, which had the effect of reinstating the Regulation. This recent history establishes that transgender people remain unable "to bring a prompt end" to antitransgender discrimination. *Varnum*, 763 N.W.2d at 894 (internal quotation marks omitted).

Based on these considerations, the fourth *Varnum* factor likewise supports applying heightened scrutiny.

ii. Jurisdictions across the country support applying heightened scrutiny to classifications that discriminate against transgender people.

Applying a similar analysis, a growing number of courts have found that intermediate or strict scrutiny is appropriate to examine classifications based on transgender status. For example, in *Adkins v. City of New York*, 143 F. Supp. 3d 134 (S.D.N.Y. 2015), the court found that discrimination against transgender people is subject to heightened scrutiny since transgender people have suffered a history of discrimination and prejudice, a person's identity as transgender has nothing to do with the person's ability to contribute to society, and transgender people represent a discrete minority class that is politically powerless to bring about change on its own. *Id*. at 139–40.

Many other courts have reached the same conclusion that discrimination against transgender people is subject to heightened scrutiny. *See, e.g.*, *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015); *Marlett v. Harrington*, No. 1:15–cv–01382–MJS (PC), 2015 WL 6123613, at *4 (E.D. Cal. 2015); *Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep't of Educ.*, 208 F. Supp. 3d 850, 874 (S.D. Ohio 2016), *stay denied*, 845 F.3d 217, 222 (6th Cir. 2016); *Evancho v. Pine–Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017); *A.H. v. Minersville Area Sch. Dist.*, 290 F. Supp. 3d 321, 331 (M.D. Pa. 2017); *M.A.B. v. Bd. of Educ. of Talbot Cnty.*, 286 F. Supp. 3d 704, 718–22 (D. Md. 2018); *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1142–45 (D. Idaho 2018); *Karnoski v. Trump*, 926 F.3d 1180, 1200–01 (9th Cir. 2019); *Flack v. Wis. Dep't of Health Servs.*, 395 F. Supp. 3d. 1001, 1019–22 (W.D. Wis. 2019); *Stone v. Trump*, 400 F. Supp. 3d 317, 355 (D. Md. 2019); *Grimm*, 972 F.3d at 607–08; *Ray v. McCloud*, No. 2:18–CV–272, 2020 WL 8172750, at *8–9 (S.D. Ohio Dec. 16, 2020).

Because Division XX classifies Medicaid beneficiaries based on transgender status, and given the *Varnum* factors and case law from other jurisdictions, heightened scrutiny applies.

iii. Division XX is not substantially related to an important government objective or narrowly tailored to a compelling government interest.

Of the two forms of heightened scrutiny, intermediate scrutiny requires a party seeking to uphold a classification to show that the "classification is substantially related to the achievement of an important governmental objective." *Varnum*, 763 N.W.2d at 880. It is the government's burden to justify the classification based on a specific policy or factual circumstances that it can prove rather than on "broad generalizations." *Id*.

The second form of heightened scrutiny, strict scrutiny, is even more exacting. "Classifications subject to strict scrutiny are presumptively invalid . . . ." *Id*. They "must be narrowly tailored to serve a compelling governmental interest." *Id.*

Division XX cannot meet either of these constitutional standards, as the district court correctly held. (App. I 769–74 (finding that the statute fails intermediate scrutiny).) There is no "important governmental objective" or "compelling governmental interest" advanced by excluding transgender people from Medicaid reimbursement for medically necessary surgical procedures, which is precisely what Division XX does by reinstating the Regulation. *Id.; see also Flack*, 395 F. Supp. 3d. at 1019–22 (striking down Wisconsin's exclusion of Medicaid coverage for medically necessary gender-affirming surgery).

Given the medical community's uniform acceptance that surgical treatment is medically necessary for some transgender people on Medicaid, denying coverage cannot be justified on medical grounds. *Good*, No. CVCV054956, at *27–30. (11/19/21 Order at 35.) Surgical treatment for gender dysphoria is medically necessary for Petitioners, as demonstrated by the unrebutted affidavits submitted by their health-care providers. (App. II 776–819; App. II AR 947–66.)

DHS suggests that Division XX is not subject to heightened scrutiny because the statute merely "clarified" the scope of ICRA. (Br. at 39.) DHS's argument completely ignores the nature of the classification created by Division XX. The so-called "clarification" is a facially antitransgender classification that reinstated the categorical ban on gender-affirming surgery invalidated in *Good*. Characterizing the statute as a "clarification," or a "respon[se] to a decision of this Court," without accounting for what the statute "clarified" or what the decision preceding its enactment required, does not satisfy the requirements of equal protection. On the contrary, targeting only transgender Iowans on Medicaid with the "clarification," and depriving only them of the nondiscrimination rights and remedies in ICRA, rather than clarifying that Medicaid as a whole is not a "public accommodation," as DHS notes it could have done (Br. at 35), illustrates the discriminatory nature of Division XX.

DHS also suggests that it was "rational" for the legislature to amend ICRA through Division XX in order to avoid "burden[ing]" state and local governments "with the cost of defending future lawsuits" under ICRA based on *Good*. (*Id*. at 39–40.) This rationale fails on its own terms since adhering to this Court's clear directive in *Good* would have ***avoided*** "future lawsuits" rather than leading to additional litigation. Ironically, the legislature's decision to amend the statute is what necessitated Petitioners' judicial-review actions.

Division XX cannot be justified as a cost-savings measure under either intermediate or strict scrutiny, whether the purported cost savings in question are those associated with denying coverage for medically necessary gender-affirming surgery or avoiding litigation on this issue. Courts, including this Court, the district court in *Good*, and the district court in this case, have rejected this rationale. *See Varnum*, 763 N.W.2d at 902–04 (cost savings could not justify exclusion of same-sex couples from marriage); *Good*, No. CVCV054956, at *27, 28–29 (rejecting cost-savings justification for Regulation). (App. I 769–74.) No court, for example, would conclude, that separate education for African American children is acceptable simply because educating children in separate facilities would save the state money. An economic justification for a suspect classification is invalid under intermediate or strict scrutiny.

For these reasons, Division XX cannot withstand heightened scrutiny under the Iowa Constitution's equal-protection guarantee.

b. Division XX fails rational-basis review.

Alternatively, Division XX cannot withstand rational-basis review, as the district court correctly concluded. (App. I 774–77.) Rational-basis review requires a "plausible policy reason for the classification." *Varnum*, 763 N.W.2d at 879 (internal quotation marks omitted). It requires that "the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker" and that "the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." *Id*. (internal quotation marks omitted).

Although the rational-basis test is "deferential to legislative judgment, it is not a toothless one in Iowa." *Racing Ass'n of Cent. Iowa v. Fitzgerald* ("*RACI*"), 675 N.W.2d 1, 9 (Iowa 2004) (internal quotation marks omitted). In addition, rational-basis scrutiny does not protect laws that burden otherwise unprotected classes when a classification is based purely on animus. *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973). At the very least, a "more searching form of rational basis review [is applied] to strike down such laws under the Equal Protection Clause." *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring).

In *Good* and in this case, the district court concluded that the Regulation did not withstand rational-basis review. *Good*, No. CVCV054956, at *30–34. (11/19/21 Order at 38–41.) For the reasons discussed above, and those relied on by the district court here and in *Good*, there is no plausible policy reason advanced by, or rationally related to, excluding transgender people from Medicaid reimbursement for medically necessary procedures. Surgical treatment for gender dysphoria, a serious medical condition, is necessary and effective. And Medicaid coverage is crucial to ensure the availability of that treatment.

DHS argues that Division XX has nothing to do with prohibiting medically necessary gender-affirming surgery. (Br. at 38.) This ignores the overtly discriminatory language of Division XX and the link between Division XX and the discriminatory Regulation.

In any event, under rational-basis review, Division XX cannot be justified as a measure to save money since there is no reasonable distinction between transgender and nontransgender people relative to their need for Medicaid coverage for medically necessary surgical care. Both groups need financial assistance for critically necessary medical treatments. Cost savings are insufficient to justify the arbitrary distinction Division XX creates between transgender and nontransgender people in need of necessary medical care. *RACI*, 675 N.W.2d at 12–15 (even under rational-basis review, there must be some reasonable distinction between the group

burdened by the law, as compared to the favored group, to justify the higher costs); *see also Diaz v. Brewer*, 656 F.3d 1008, 1014 (9th Cir. 2011); *Bassett v. Snyder*, 59 F. Supp. 3d 837, 854–55 (E.D. Mich. 2014).

Varnum supports this conclusion. While *Varnum* applied intermediate scrutiny to Iowa's marriage statute, the *Varnum* Court's rejection of cost savings as a rationale for the discriminatory treatment of same-sex couples applies equally to rational-basis review:

> Excluding any group from civil marriage—African–Americans, illegitimates, aliens, even red-haired individuals—would conserve state resources in an equally "rational" way. Yet, such classifications so obviously offend our society's collective sense of equality that courts have not hesitated to provide added protections against such inequalities.

Varnum, 763 N.W.2d at 903.

Indeed, providing insurance coverage for transgender patients has been shown to be "affordable and cost-effective, and has a low budget impact." William V. Padula, PhD, et al., *Societal Implications of Health Insurance Coverage for Medically Necessary Services in the U.S. Transgender Population: A Cost-Effectiveness Analysis*, Johns Hopkins Bloomberg Sch. of Public Health, Dep't of Health Policy and Management (Oct. 19, 2015), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4803686 (finding that the budget impact of this coverage was $0.016 per member per month and provided "good value for reducing the risk of negative endpoints—HIV, depression, suicidality, and drug use"); *see also* Jody

L. Herman, *Costs and Benefits of Providing Transition-Related Health Care Coverage in Employee Health Benefits Plans*, Williams Institute (Sept. 2013), *available at* https://williamsinstitute.law.ucla.edu/publications/trans-employee-transition-coverage/ (noting that employers report zero or very low costs, and substantial benefits, for them and their employees when they provide transition-related health-care coverage in their employee-benefit plans).

DHS also ignores the medical costs associated with *denying* transgender people access to medically necessary transition-related care. With the availability of that care, transgender people's overall health and well-being improve, resulting in significant reductions in suicide attempts, depression, anxiety, substance abuse, and self-administration of hormone injections. Cal. Dep't of Ins., *Economic Impact Assessment: Gender Nondiscrimination in Health Insurance* (Apr. 13, 2012), *available at* https://transgenderlawcenter.org/wp-content/uploads/2013/04/Economic-Impact-Assessment-Gender-Nondiscrimination-In-Health-Insurance.pdf.

Moreover, estimates show that only approximately 0.31 percent—i.e., fewer than 7,500—of adult Iowans identify as transgender. Andrew R. Flores, et al., *How Many Adults Identify as Transgender in the United States?*, Williams Institute (June 2016), *available at* http://williamsins titute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-Unite d-States.pdf. In turn, only a subset of them rely on Medicaid for health-insurance coverage. The small size of

this population, combined with the fact that gender-affirming surgery is reserved for treating "severe" gender dysphoria (App. II 812, ¶ 29; App. II 817, ¶ 54; 818, ¶ 56), such as the gender dysphoria unanimously diagnosed by Petitioners' health-care providers (App. II 776–819; App. II AR 947–66), further negates any assertion that prohibiting Medicaid reimbursement for gender-affirming surgery is a fiscal necessity for the State of Iowa.

DHS failed to address this evidence, either in the administrative record or on judicial review, and the district court properly relied upon it to find that "[t]he percentage of Iowans who are on Medicaid, identify as transgender, and qualify as candidates for gender-affirming surgery is incredibly small," the cost of providing coverage to those individuals is "negligible," and "there are greater medical costs associated with denying transgender individuals access to transition-related care and necessary surgical procedures." (App. I 777.) On appeal, DHS does not challenge these findings, which apply equally to Division XX and the Regulation.

Based on these facts, it is unsurprising that more and more state governments are ending exclusions on coverage for gender-affirming surgery. *See* Cal. Dep't of Health Care Servs., *Ensuring Access to Medi-Cal Services for Transgender Beneficiaries* (Oct. 6, 2016), *available at* http://www.dhcs.ca.gov/formsandpubs/Documents/MMCDAPLsandPolicyLetters/APL/APL16-013.pdf; 10 Colo. Code Regs. § 2505–108.735; Conn. Gen. Stat. § 46a–71(a); Del. Dep't of Ins., *The Gender*

Identity Nondiscrimination Act of 2013 (March 2016) Bulletin 86, *available at* https://insurance.delaware.gov/wp-content/uploads/sites/15/2016/11domestic-foreign-insurers-bulletin-no86.pdf; Dep't of Health Care Finance, *DHCF Issues Policy Clarifying Medicaid Coverage of Gender Reassignment Surgery* (Sept. 2016), *available at* https://dhcf.dc.gov/release/dhcf-issues-policy-clarifying-medicaid-coverage-gender-reassignment-surgery.pdf; Haw. Rev. Stat. §§ 431:10A– 118.3(a), 432:1–607.3, 432D–26.3 (2022); Md. Dep't of Health & Mental Hygiene, *Managed Care Organizations Transmittal No. 110* (March 2016), *available at* https://mmcp.health.maryland.gov/MCOupdates/Documents/pt_37_16.pdf; Mass Health, *Guidelines for Medical Necessity Determination for Gender Reassignment Surgery* (2015), *available at* https://www.mass.gov/files/documents/2016/07/ow/mg-genderreassignment.pdf; Minn. Dep't of Human Servs., *Provider Manual* (2017), *available at* https://www.dhs.state.mn.us/main/idcplg?IdcService=GET_DYNAMIC_CONVERSION&RevisionSelectionMethod=LatestReleased&dDocName=DHS-297587; Mont. Dep't Pub. Health & Human Servs., *Healthcare Programs Notice* (May 2017), *available at* https://medicaidprovider.mt.gov/Portals/68/docs/providernotices/2017/provnoticenondiscriminationgendertransition05252017.pdf; *Web Announcement 1532* (2018), *available at* https://www.medicaid.nv. gov/Downloads/provider/web_announcement_1532_ 201 80223.pdf; 2017 NJ Sess. Law Serv. Ch. 176 (ASSEMBLY 4568) (WEST); 18 NYCRR 505.2; Ore. Health

Auth., *Oregon Health Plan Handbook* 13 (March 2017), *available at* https://aix-xweb1p.state.or.us/es_xweb/DHSforms/Served/he9035_.pdf; Penn. Dep't Human Servs., *Medical Assistance Bulletin 99–16–11* (July 2016), *available at* http://www.dhs.pa.gov/cs/groups/webcontent/documents/bulletin_admin/c_233793.pdf; R.I. Exec. Office of Health & Human Servs., *Gender Dysphoria/Gender Nonconformity Coverage Guidelines* (2015), *available at* http://www.eohhs.ri.gov/Portals/0/Uploads/Documents/MA%20Providers/MA%20Reference%20Guides/Physician/gender_dysphoria.pdf; Wash. Admin. Code § 182–531–1675; Dep't of Vt. Health Access, *Gender Reassignment Surgery* (2016), *available at* http://dvha.vermont.gov/for-providers/gender-reassignment-surgery-w-icd-10-coded-111616. pdf; Christy Mallory et al., *Medicaid Coverage for Gender-Affirming Care*, Williams Institute (Oct. 2019), *available at* https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiqr9vz_6HxAhWtAp0JHe2_BBUQFjAGegQICBAF&url=https%3A%2F%2Fwilliamsinstitute.law.ucla.edu%2Fwp-content%2Fuploads%2FMedicaid-Gender-Care-Oct-2019.pdf&usg=AOvVaw2f7fn_6eSMt-2x9C62pMcW (summarizing the status of Medicaid coverage for gender-affirming care, including surgery, among state governments); *see also* Dep't of Health & Human Servs. Dep't'l Appeals Bd. Decision No. 2576 (May 30, 2014), *available at*

https://www.hhs.gov/sites/default/files/static/dab/decisions/board-decisions/2014/dab2576.pdf (addressing Medicare coverage for transition-related care).

To the extent DHS now claims that Division XX was a rational attempt to avoid litigation costs associated with the issues addressed by *Good* (Br. at 39–40), that rationale likewise fails. As noted above, adhering to this Court's decision in *Good* would have avoided litigation, not engendered more of it. In addition, saving money on litigation does not justify the arbitrary distinction Division XX creates between transgender and nontransgender people in need of necessary medical care.

For these reasons, Division XX cannot withstand rational-basis review under the Iowa Constitution's equal-protection guarantee.

B. Division XX was motivated by animus toward transgender people.

Alternatively, Division XX violates the Iowa Constitution's equal-protection guarantee because it was motivated by animus toward transgender people, as illustrated by the legislative commentary preceding Division XX's enactment, the procedural framework in which the statute was passed, and the discriminatory nature of the classification imposed by the statute.

Petitioners have asserted this argument in their response to DHS's appeal, rather than in their cross-appeal, because their animus argument is an alternative ground for affirming the district court's equal-protection ruling and was presented to the district court. *See Duck Creek Tire Serv., Inc. v. Goodyear Corners, L.C.*, 796

N.W.2d 886, 893 (Iowa 2011) ("[A] prevailing party can raise an alternative ground for affirmance on appeal without filing a notice of cross-appeal, as long as [it] raised the alternative ground in the district court."). As either an alternative ground for affirmance or an independent basis for a cross-appeal, the same conclusion applies: The district court should have found that Division XX's enactment was motivated by discriminatory animus. (*See* 11/19/21 Order at 41–47.)

The evidence establishing Division XX's discriminatory animus toward transgender people is overwhelming. For example:

- In urging his colleagues to vote against Division XX, Senator Joseph Bolkcom identified the discriminatory purpose of the legislation, noting that "[t]he language in this bill targets coverage for [transgender Iowans'] essential and necessary medical treatments." Iowa General Assembly, Session, House File 766, Video Recording of 4/27/19 Debate, *available at* https://www.legis.iowa.gov/dashboard?view=video&chamber=S&clip=s20190426012941549&dt=201904026&offset=2721&bill=HF%20766&status=r, at 2:27:55 (Sen. Bolkcom). Senator Bolkcom also explained to his colleagues that the country's marquee medical associations "support the view that medically necessary care is needed" and "believe these medical procedures should be covered under public insurance programs." *Id*.

- Well aware of Division XX's discriminatory purpose, Senator Mark Costello plainly stated that Division XX was being enacted "to react to the lawsuit that came up" by changing the administrative code back to the way it was before the lawsuit. *See id.* at 2:31:44. Senator Costello did not agree that gender-affirming surgery "is always medically necessary, which is what Medicaid is about," and also did not agree that funding gender-affirming surgery through Medicaid was "a proper use of federal or . . . state monies." *See id.; see also* Tony Leys & Barbara Rodriguez, *Iowa Republican lawmakers ban use of Medicaid*

dollars on transgender surgery, The Des Moines Register (Apr. 27, 2019), *available at* https://www.desmoinesregister.com/story/news/politics/2019/04/26/iowa-legislature-senate-republicans-propose-ban-medicaid-money-transgender-surgery-lawsuit-courts/3578920002/.

- In the Iowa House of Representatives, the only comments supporting Division XX came from the bill manager, Representative Joel Fry, who described Division XX's function, in discriminatory terms, as "amending [ICRA] to clarify that we are not requiring any government unit in the state to provide for gender reassignment surgeries." Iowa General Assembly Session, House File 766, Video Recording of 4/27/19 Debate, *available at* https://www.legis.iowa.gov/dashboard?video&chamber=H&clip=h20190427092516225&dt=2019-04-27&offset=6564&bill=HF%207 66&status=r, at 11:24:30 (Rep. Fry).

- The rest of the comments in the House debate came from opponents. For example, Representative Beth Wessel-Kroeschell criticized Division XX, saying: "This amendment takes away the civil rights of Iowa's transgender population." *Id.* at 11:36:50 (Rep. Wessel-Kroeschell). She added: "This proposal deserved to be thoroughly examined, and it was not. This amendment was mean-spirited and cruel." *Id.* at 11:37:10.

- Similarly, Representative Kirsten Running-Marquardt stated: "I question the integrity of a body that passes language that denies Iowans critical health care because they're transgender. That's what this bill does. . . We are codifying discrimination against people and their health-care needs because they're transgender . . . . It is the doctor's decision what is critical health care. It is not the people in this chamber. It is not your decision." *Id.* at 12:30:20 (Rep. Running-Marquardt).

- Governor Kim Reynolds, for her part, is on record as saying: "This [legislation] takes it back to the way it's always been. This has been the state's position for decades." *See* Caroline Cummings, *Governor Reynolds stands by signing bill with Medicaid coverage ban on transgender surgery* (May 7, 2019), *available at* https://cbs2iowa.com/news/local/gov-kim-reynolds

-stands-by-decision-to-sign-budget-bill-with-transgender-surgery-ban.

In addition to the legislative commentary preceding Division XX's enactment, the procedural framework within which the statute was passed is highly suspect. Division XX was never subject to normal filing, subcommittee, or committee processes. (App. II 907–08, ¶¶ 7–8; App. II 912, ¶ 10.) Members of the public had no opportunity to submit input or share their concerns. (App. II 907–08, ¶¶ 7–8; App. II 912–14, ¶ 10–11, 12–14, 16.) Rather than the typical time line of several weeks to months that usually accompanies the lawmaking process, the time between filing the amendment containing Division XX, on the one hand, and passing the final legislation in both chambers, on the other, was a mere 32 hours. (App. II 907–08, ¶ 8, App. II 913, ¶ 12.) As the district court acknowledged, "there appear[ed] to be little public debate" over Division XX, and "[t]he supporters of the amendment and those who voted in its favor provided no real support for their reasons for passing the law." (App. I 782.)

Furthermore, on its face, Division XX targets transgender people. The statute expressly references "sex reassignment surgery" and surgical procedures related to "transsexualism" and "gender identity disorder," stating that the public-accommodation provisions of ICRA "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." Iowa Code § 216.7(3) (2022). By its own terms, Division XX restored the discriminatory Regulation that was struck down in *Good*. *Good*, 924 N.W.2d at 862–63.

Contrary to DHS's contentions, the legislature's discretion to decide the scope of ICRA's coverage does not place Division XX beyond equal-protection review. (Br. at 35–37.) The legislature does not have boundless discretion to amend ICRA when it does so with the purpose and effect of harming a discrete group of Iowans—an outcome DHS itself concedes could have been avoided by adopting a more generalized measure, such as "clarifying [that] Medicaid [i]sn't a public accommodation." (*Id*. at 35 (emphasis added).)

A legislative amendment that purposely harms transgender Iowans violates equal protection. This is true even where the amendment removes statutory protections the state was never required to provide. *See Romer* v. *Evans*, 517 U.S. 620, 627 (1996) (removing and prohibiting state and local antidiscrimination protections violated equal protection); *Moreno*, 413 U.S. 528 at 534 (amending Food Stamp Act to exclude households of unrelated individuals, such as "hippies" living in "hippie communes," violated equal protection); *Perry v. Brown*, 671 F.3d 1052, 1083 (9th Cir. 2012), *vacated and remanded on other grounds sub nom. Hollingsworth v. Perry*, 570 U.S. 693 (2013) (state initiative to take away marriage

for same-sex couples violated equal protection, even if there was no constitutional right to marriage).

The U.S. Supreme Court has long recognized that a law is irrational, and categorically violates equal protection, if its purpose is to target a disadvantaged group. *See United States v. Windsor*, 570 U.S. 744, 770 (2013) ("'[A] bare [legislative] desire to harm a politically unpopular group cannot' justify disparate treatment of that group.") (quoting *Moreno*, 413 U.S. at 534–35); *Cleburne*, 473 U.S. at 448 ("[M]ere negative attitudes, or fear . . . are not permissible bases for [a statutory classification]."); *Romer*, 517 U.S. at 632 (amendment that was "inexplicable by anything but animus toward the class it affect[ed] . . . lack[ed] a rational relationship to legitimate state interests").

Division XX does not simply take away ICRA's protections from discrimination by third-party private actors, as occurred in *Romer*; it specifically authorizes the state to discriminate against a particular, disfavored group. The statute restored the discriminatory Regulation struck down under ICRA in *Good*. Together with the Regulation, the statute violates equal protection by allowing the state to deny Medicaid coverage for medically necessary surgery to transgender Iowans, including Petitioners, solely because they are transgender. *See Diaz*, 656 F.3d at 1012–15 (law limiting health-insurance benefits to married couples, when state law

prohibited same-sex couples from marrying, violated equal protection); *Bassett*, 951 F. Supp. at 963 (same).

By eliminating ICRA's protections for transgender Iowans' publicly funded, medically necessary Medicaid coverage, Division XX violates equal protection in the same way that eliminating nondiscrimination protections, food stamps, and marriage violated equal protection in *Romer*, *Moreno*, and *Perry*. *See Romer*, 517 U.S. at 627; *Moreno*, 413 U.S. at 534; and *Perry*, 671 F.3d at 1083. Likewise, Division XX works together with the Regulation to violate equal protection, as did the statutes at issue in *Diaz* and *Bassett*, which limited benefits to married couples where state law at the time prevented same-sex couples from marrying. Based on these well-established authorities, the state's discretion to determine what ICRA does and does not cover is not a defense to Petitioners' equal-protection challenges to Division XX.

DHS does not mention, much less question, any of these principles. Instead, it argues, as it did before the district court, that this Court should discount the legislative commentary cited by Petitioners because "the views of an individual legislator are not persuasive in determining legislative intent." (Br. at 29; App. I 779–780.) This is the wrong standard. The cases on which DHS relies—and which the district court cited—regarding the relationship between statutory interpretation and legislative history are inapposite. (*Id*.) Petitioners do not seek an interpretation

of Division XX's language, which is crystal clear. There is no dispute about the meaning or impact of Division XX's language.

Instead, Petitioners seek to show that Division XX's enactment was motivated by discriminatory animus toward transgender people. This is precisely the type of situation in which individual legislators' statements are highly probative. For example, in *Moreno*, the U.S. Supreme Court found animus based on a single legislator's comments about "hippies." *Moreno*, 413 U.S. at 534. And in *Windsor*, the Court found animus based on three statements in a legislative report from the House of Representatives. *Windsor*, 570 U.S. at 770–71. As the Court noted in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), the legislative history of a statute, "especially where there are contemporary statements by members of the decisionmaking body," may provide evidence of racial animus. *Id*. at 268; *see also Arce v. Douglas*, 793 F.3d 968, 978 (4th Cir. 2015) (concluding that "only a few snippets of overtly discriminatory expression . . . reasonably suggest[ed] an intent to discriminate"); *Bassett*, 951 F. Supp. 2d at 969 (rejecting argument "that statements of legislators are insufficient as a matter of law to support a finding of discriminatory animus").

Thus, when a statute contains a facially discriminatory classification, such as Division XX's classification of transgender people, and individual statements from legislators corroborate the discriminatory animus evidenced by the discriminatory

text of the statute, the classification and the statements, taken together, serve as evidence that the statutory classification was motivated by animus. *See Moreno*, 413 U.S. at 534; *Windsor*, 570 U.S. at 770–71; *see also Romer*, 517 U.S. at 632 (inferring animus where the statute's imposition of a "broad and undifferentiated disability on a single named group" was "so discontinuous with the reasons offered for it that the amendment seem[ed] inexplicable by anything but animus toward the class it affect[ed]"). Here, because Division XX was motivated by animus toward transgender people, it violates the Iowa Constitution's equal-protection guarantee.

PETITIONERS' CROSS-APPEAL

III. Petitioners were not required to assert their ICRA claims before the Commission.

The district court erred in concluding that Petitioners' ICRA claims were barred because Petitioners failed to assert them before the Commission. (App. I 672–77; App. I 738–41.) This issue has been properly preserved for appeal since it was briefed, argued, and decided below. (App. I 240–42; App. I 691–95 App. I 672–77; App. I 738–41.) Because the issue was decided in the context of Petitioners' chapter 17A judicial-review actions, it is subject to de novo review. *Bearinger v. Iowa Dep't of Transp.*, 844 N.W.2d 104, 105 (Iowa 2014).

This Court's decision in *Hollinrake v. Monroe County*, 433 N.W.2d 696, 698–99 (Iowa 1988), establishes that, when a discrimination claim is directed at the underlying structure or substance of an agency regulation, rather than at a

"discretionary individual" decision applying the regulation, review of the regulation is governed by the provisions of the APA, Iowa Code § 17A.19.1, *et seq*. (2022), not those of ICRA, Iowa Code § 216.1, *et seq*. (2022). Under the APA, DHS, not the Commission, was the appropriate administrative forum for Petitioners' argument that the Regulation violates ICRA's prohibitions against gender-identity discrimination.

Hollinrake involved an ICRA challenge to an Iowa Law Enforcement Academy regulation requiring law-enforcement officials to meet particular vision standards. *Hollinrake*, 433 N.W.2d at 697. This Court determined that the plaintiff was required to assert his challenge by seeking review of the academy's regulation under the APA rather than through a civil-rights action under ICRA before the Commission. *Id.* at 698–99. The Court's decision contemplated that the academy would hear the plaintiff's ICRA challenge and that the academy's determination would later be subject to judicial review under the APA. *Id*.

Here, as in *Hollinrake*, Petitioners' challenges to the Regulation's legality under ICRA are "directed at the alleged discriminatory nature" of the Regulation as a whole. *Id*. at 699. Those challenges were properly before the district court on judicial review under the APA.

Several other considerations support this conclusion. *First*, the absence of administrative exhaustion before the Commission in *Good* confirms that Petitioners

were not required to assert their ICRA claims before the Commission. In that case, both plaintiffs asserted ICRA claims before DHS, and both plaintiffs were allowed to proceed with their claims. *Good*, 924 N.W.2d at 858–59 (discussing administrative proceedings before DHS); *Good*, No. CVCV054956, at *8–10 (same). The same should be true here.

The fact that DHS did not argue administrative exhaustion in *Good* is immaterial. Administrative exhaustion is jurisdictional. *See Simpson v. Iowa Dep't Job Serv.*, 327 N.W.2d 775, 777 (Iowa 1982); *Graves v. Iowa Lakes Cmty. Coll.*, 639 N.W.2d 22, 26 & n.1 (Iowa 2002), *overruled on other grounds by Kiesau v. Bantz*, 686 N.W.2d 164, 171 (Iowa 2004). Objections to administrative exhaustion cannot be waived just because they are not asserted. *See Simpson*, 327 N.W.2d at 777 (stating, in the context of addressing administrative-exhaustion argument sua sponte, that "jurisdiction of the subject matter . . . may be raised at any time and is not waived even by consent"); *Graves*, 639 N.W.2d at 26 & n.1 (stating, in context of addressing administrative-exhaustion argument asserted in cross-appeal, that subject-matter jurisdiction "cannot be waived by consent or estoppel").

Second, under principles of judicial estoppel, DHS's admission in the *Good* fee litigation that administrative exhaustion was unnecessary confirms that Petitioners were not required to assert their ICRA claims before the Commission. The *Good* fee litigation culminated in the entry of a judgment by the Court of

Appeals affirming the denial of the plaintiffs' application for attorney's fees. *Good v. Iowa Dep't of Human Servs.*, No. 18–1613, 2019 WL 5424960, at *5 (Iowa Ct. App. 2019). During the course of the briefing resulting in that judgment, DHS conceded that section 17A.19 of the APA is the appropriate pathway for challenging the validity of an agency rule that violates ICRA. Specifically, in arguing that the plaintiffs were not eligible for attorney's fees under ICRA, DHS stated as follows:

> Petitioners did not plead a claim under the ICRA. Rather, they merely pled an IAPA claim of a violation of the ICRA, ***as they were required to do pursuant to this Court's prior rulings***. *Hollinrake v. Monroe Cnty.*, 433 N.W.2d 696, 699–700 (Iowa 1988) (finding the IAPA to be the "exclusive means for challenging" agency rules as violative of the ICRA); *Chiavetta v. Iowa Bd. of Nursing*, 595 N.W.2d 799, 803 (Iowa 1999) (characterizing *Hollinrake* as "requiring" ICRA challenges to agency rules to be "confined to chapter 17A").

(App. I 695 (emphasis added).)

DHS thus conceded that the plaintiffs in *Good* were "required" to proceed with their ICRA claims in the context of an action for judicial review under the APA rather than by independently asserting those claims before the Commission. (*Id*.) DHS cannot reverse the position it asserted in *Good* to escape a conclusion it wishes to avoid in this case. *See Winnebago Indus., Inc. v. Haverly*, 727 N.W.2d 567, 573 (Iowa 2006) (stating that the doctrine of judicial estoppel "is intended to protect the integrity of the fact-finding process" and "prohibits a party who has successfully and unequivocally asserted a position in one proceeding from asserting an inconsistent position in a subsequent proceeding").

Third, the APA expressly contemplates that Iowa administrative agencies will interpret statutes such as ICRA and that their interpretations will be subject to judicial review. This is implicit in the grounds for review listed in section 17A.19(10) of the APA. Under section 17A.19(10), a court may reverse an agency action if substantial rights of the person seeking judicial relief have been prejudiced because the agency action is:

- "beyond the authority delegated to the agency by any provision of law or *in violation of any provision of law*," Iowa Code § 17A.19(10)(b) (2022) (emphasis added);

- "based 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) (2022) (emphasis added); or

- "*not required by law* and its negative impact on the private rights affected is so grossly disproportionate to the benefits accruing to the public interest . . . that it must necessarily be deemed to lack any foundation in rational agency policy," Iowa Code § 17A.19(10)(k) (2022) (emphasis added).

Each of these provisions permits judicial review of whether an administrative agency's actions violate an Iowa statute, such as ICRA. These provisions further support the conclusion that DHS, not the Commission, was the appropriate administrative forum for Petitioners' challenges to the Regulation under ICRA. The district court erred in concluding otherwise.

Fourth, this Court's decision in *Chiavetta v. Iowa Board of Nursing*, 595 N.W.2d 799 (Iowa 1999), confirms that Petitioners were not required to assert their

ICRA claims before the Commission. In *Chiavetta*, this Court applied its previous administrative-exhaustion decisions in *Jew v. University of Iowa*, 398 N.W.2d 861 (Iowa 1987), and *Hollinrake* in holding that the plaintiff was not exclusively restricted to challenging the Iowa Board of Nursing's disciplinary action against him in agency proceedings, but rather had the right to sue the board under ICRA. *Id.* at 801–03.

In doing so, the Court discussed the same provision of ICRA on which DHS relied before the district court. *Id*. The provision in question states that ICRA "applies to persons claiming to be aggrieved by an unfair or discriminatory practice committed by the state or an agency or political subdivision of the state, *notwithstanding the terms of the Iowa administrative procedure Act*." *Id*. (quoting Iowa Code § 216.16(1)) (emphasis added)).

The Court considered this language in conjunction with the same language from section 17A.19 of the APA referenced in the district court's August 10, 2021, order—namely, that "*[e]xcept as expressly provided otherwise by another statute referring to this chapter by name*," chapter 17A's judicial-review provisions "shall be the exclusive means" of seeking judicial review. *Id.* (quoting Iowa Code §17A.19) (emphasis in original). (App. I 677.)

Based on the nature of the plaintiff's claim against the board, the Court concluded that the claim fell within the "exception to [the] administrative

framework" of section 17A.19 that the legislature "expressly carved out . . . for actions commenced under . . . section 216.16(1) [of ICRA]." *Id*. at 802. Against this backdrop, the Court maintained the distinction established in *Jew* and *Hollinrake* between "direct attack[s] on [an] agency's statutory authority," such as the ICRA claims at issue this case and *Hollinrake*, and situations "where the challenged agency action . . . bears scant relation to the agency's mandate," such as the claims at issue in *Jew* and *Chiavetta*. *Id*. at 803.

In particular, the Court noted that the challenge to agency authority in *Hollinrake* "struck at the very heart of the [agency's] statutory duty." *Id*. The Court concluded that this type of "direct attack on the agency's statutory authority ***must be confined to chapter 17A.***" *Id*. (emphasis in original). Since, unlike here, "no published agency rule [was] implicated" in *Chiavetta*, and since the suit filed by the plaintiff in *Chiavetta* "f[ell] outside the scope of the nursing board's statutory mandate to license and discipline nurses," the "exception to the exclusivity provision of section 17A.19" of the APA set forth in section 216.16(1) of ICRA allowed the plaintiff to pursue his claims under ICRA. *Id*. at 803.

Chiavetta demonstrates that, although the language from ICRA on which DHS relied before the district court allows a plaintiff aggrieved by an agency action to pursue a claim against the agency under ICRA, it does not bar the plaintiff from pursuing that claim in the context of a judicial-review action under section 17A.19

of the APA. As acknowledged in *Hollinrake* and reaffirmed in *Chiavetta*, where, as here, a claim "is directed at the alleged discriminatory nature" of a rule as a whole, in contrast to being directed at "a discretionary individual . . . decision" that has "little connection with the mandate of the agency," then the claim can—and, in fact, must—be asserted in the context of a section 17A.19 action. *Hollinrake*, 433 N.W.2d at 699; *Chiavetta*, 595 N.W.2d at 802–03 (noting that such a claim "must be confined to chapter 17A").

If it were otherwise, then a party aggrieved by agency misconduct that violated ICRA would have to pursue two parallel, and potentially inconsistent, tracks of administrative exhaustion—one before the Commission and one before the agency whose rule is at issue—in order to receive complete relief. The practical and prudential problems would be compounded once the matter reached the courts, because a chapter 17A judicial-review action may not be combined with an original action like an ICRA civil-rights complaint. *Black v. Univ. of Iowa*, 362 N.W.2d 459, 462–63 (Iowa 1985). The district court's interpretation of chapter 17A increases, rather than minimizes, the potential for inefficiency and confusion, a result that must be avoided. *See State v. Adams*, 810 N.W.2d 365, 369 (Iowa 2012) (courts "will not construe the language of a statute to produce an absurd or impractical result"); *In re Detention of Bosworth*, 711 N.W.2d 280, 283 (Iowa 2006) (same).

IV. The Regulation violates ICRA's prohibition against gender-identity discrimination.

Because the district court erred in concluding that Petitioners' ICRA claims were barred, the court did not address Petitioners' argument that the Regulation violates ICRA's prohibition against gender-identity discrimination under the preamendment version of section 216.7 of ICRA. (App. I 677.) This issue has been properly preserved for review since it was briefed and argued before the district court. (App. I 352–53; App. I 646–47.) The issue is subject to de novo review. *Bearinger*, 844 N.W.2d at 105. Based on this Court's decision in *Good*, the district court should have concluded that the Regulation violates ICRA.

DHS's concession that the Regulation is unconstitutional does not moot the issue of the Regulation's legality under ICRA. ICRA entitles Petitioners to remedies different from the injunctive relief awarded with respect to the Regulation, including fee-shifting. *See* Iowa Code § 216.15(9)(a)(8) (2022). ICRA's fee-shifting provision promotes critically important public-policy interests. In particular, it ensures "that private citizens can afford to pursue the legal actions necessary to advance the public interest vindicated by the polices of civil rights acts." *Vroegh v. Iowa Dep't of Corrections*, 972 N.W.2d 686, 704–05 (Iowa 2022) (internal quotation marks omitted). The availability of fee-shifting in connection with Petitioners' ICRA claims differentiates those claims from their equal-protection claims and mandates independently resolving both the former and the latter. *See id*. at 704–05 (recovery

on one civil-rights claim at trial did not moot appeal regarding judgment on a second, related claim given the potential for recovering attorney's fees on the second claim).

A. The preamendment version of section 216.7 of ICRA remains in effect.

Because Division XX is unconstitutional, the amendment to ICRA under which "state or local government unit[s] or tax-supported district[s]" are no longer required "to provide for sex reassignment surgery" or any surgical procedure "related to transsexualism [or] gender identity disorder" is null and void. Iowa Code § 216.7(3) (2022). As this Court has long held, "[w]hen parts of a statute or ordinance are constitutionally valid, but other discrete and identifiable parts are infirm," a court will "leave the valid parts in force on the assumption that the legislature would have intended those provisions to stand alone." *See Zarate*, 908 N.W.2d at 844 (internal quotation marks and citations omitted). The preamendment version of section 216.7 of ICRA does not suffer from any constitutional infirmities. That version, which prohibits gender-identity and sex discrimination in public accommodations, and contains no exclusions for gender-affirming surgery, should remain in effect.

B. The Regulation violates ICRA's prohibition against gender-identity discrimination.

The Regulation violates ICRA's prohibition against gender-identity discrimination. As this Court explained in *Good*, "[i]n 2007, the Iowa legislature

amended . . . ICRA to add 'gender identity' to the list of protected groups." *Good*, 924 N.W.2d at 862. Under section 216.7(1)(a) of ICRA, "it is 'unfair or discriminatory' for any 'agent or employee' of a 'public accommodation' to deny services based on 'gender identity.'" *Id*. The Court acknowledged that "ICRA's gender identity classification encompasses transgender individuals—especially those who have gender dysphoria—because discrimination against these individuals is based on the nonconformity between their gender identity and biological sex." *Id*. The Court further acknowledged that ICRA's "prohibition against denying coverage for [the plaintiffs'] gender-affirming surgical procedures extend[ed] to the director and staff of . . . DHS, as well as its agents, the MCOs," including Amerigroup, the MCO for one of the plaintiffs. *Id*. The Court went on to hold that the Regulation's plain language violates ICRA's prohibition against gender-identity discrimination. *Id*. The Court also found that "the history behind" the Regulation supported its holding. *Id*.

Because Division XX is unconstitutional, the Court's holding in *Good* regarding ICRA's gender-identity protections continues to govern the Regulation. As established in *Good*, the Regulation's categorical ban on Medicaid reimbursement for gender-affirming surgery violates ICRA's prohibition against gender-identity discrimination. The Regulation thus cannot support DHS's denials of Petitioners' requests for Medicaid coverage.

V. Petitioners are entitled to recover their attorney's fees and costs.

The district court also erred in denying Petitioners' requests for attorneys' fees and costs under ICRA and EAJA. (App. I 794.) This issue has been properly preserved for review since it was briefed, argued, and decided below. (App. I 250–; App. I 653–55; App. I 794.) The issue is subject to de novo review. *Bearinger*, 844 N.W.2d at 105.

A. ICRA and EAJA expressly authorize fee-shifting, and neither the *Good* attorney's-fee decision nor *Hollinrake* prohibit it.

ICRA and EAJA both allow Petitioners to recover their attorney's fees and costs. Attorney's fees are a permissible "remedial action" under ICRA, which, by its own terms, must be "broadly" construed. *See* Iowa Code §§ 216.15(9)(a)(8), 216.16(6), 216.18(1) (2022). Likewise, EAJA expressly allows fee-shifting in non-rulemaking cases under the APA in order to facilitate meritorious claims by private parties against unreasonable exercises of administrative authority. *See* Iowa Code § 625.29(1) (2022); Susan M. Olson, *How Much Access to Justice from State "Equal Access to Justice Acts"?*, 71 Chi.–Kent L. Rev. 547, 555 (1995).

Before the district court, DHS cited the *Good* attorney's-fee decision to support its arguments that (1) *Hollinrake* bars fee-shifting under ICRA for civil-rights claims brought in a judicial-review action under the APA, and (2) fee-shifting is prohibited in this case under EAJA's exceptions for cases in which "the state's role in the case was primarily adjudicative" or "the role of the state was to determine

the eligibility or entitlement of an individual to a monetary benefit or its equivalent." Iowa Code § 625.29 (1)(a), (d) (2022). (App. I 225 (citing *Good*, 2019 WL 542496).)

Unlike the published opinion by this Court in *Good*, the attorney's-fee decision in *Good* is *not* controlling, because unpublished Iowa Court of Appeals opinions are not binding legal authority. *State v. Murray*, 796 N.W.2d 907, 910 (Iowa 2011) (citing Iowa Court Rule 6.904(2)(c) ("Unpublished opinions or decisions shall not constitute controlling legal authority."). *Good* also specifically did not reach the question whether the role of the agency in that case was "primarily adjudicative." *Good*, 2019 WL 5424960, at *11.

Furthermore, *Hollinrake* does not prohibit awarding attorneys' fees under ICRA for violations asserted through the procedural mechanisms of the APA. *See Hollinrake*, 433 N.W.2d at 697–98; *Hollinrake v. Iowa Law Enforcement Acad., Monroe Cnty*., 452 N.W.2d 598, 604 (Iowa 1990). *Hollinrake*'s holding is about the appropriate procedural mechanism for seeking remedies, not about the ultimate availability of attorneys' fees. The *Hollinrake* Court did not rule on the propriety of fee-shifting for ICRA claims brought through a judicial-review action under the APA. After the case was remanded, the plaintiff's ICRA disability-discrimination claim was unsuccessful, and the Court had no reason to address whether fee-shifting was appropriate. *Hollinrake*, 452 N.W.2d at 604.

Reading *Hollinrake* to prohibit fee-shifting when an ICRA claim is brought in an APA judicial-review action is inconsistent with the plain language of ICRA, EAJA, and the APA. *See* Iowa Code §§ 216.15(9)(a)(8), 216.16(6), 216.18(1) (2022) (allowing fee-shifting under ICRA); Iowa Code § 625.29(1) (2022) (allowing fee-shifting under EAJA); Iowa Code § 17A.19 (2022) (stating that "nothing" in the APA shall abridge a party's "right to seek relief from [agency] action in the courts").

It also undermines the legislative purpose of ICRA's fee-shifting provision. Awarding attorney's fees to prevailing plaintiffs under ICRA is "crucial" to accomplish the statute's legislative purpose. *See Ackelson v. Manley Toy Direct, LLC*, 832 N.W.2d 678, 687 (Iowa 2013) (quoting *Ayala v. Ctr. Line, Inc.*, 415 N.W.2d 603, 605 (Iowa 1987)). The legislature expressly mandated that ICRA must be "broadly" construed. Iowa Code § 216.18(1) (2022). The dual functions of fee-shifting provisions—like ICRA's fee-shifting provision for violating antidiscrimination laws—are to ensure that (1) plaintiffs are able to secure competent legal representation for meritorious claims and (2) attorneys working on contingency have an incentive to screen out nonmeritorious claims. Several courts and commentators have recognized these functions. *See, e.g.*, Robert V. Percival & Geoffrey Miller, *The Role of Attorney Fee Shifting in Public Interest Litigation*, L. & Contempt. Probs. (Winter 1984); *Marek v. Chesny*, 473 U.S. 1, App. at 44–51 (1985) (Brennan, J., dissenting) (collecting federal statutory fee-shifting provisions);

Evans v. Jeff D., 475 U.S. 717, 745 (1986) (Brennan, J., dissenting) (discussing the legislative history of fee-shifting provisions); Kathryn A. Sabbeth, *What's Money Got to Do with It?: Public Interest Lawyering and Profit*, 91 Denv. U. L. Rev. 441, 493 (2014); *see also Lee v. State*, 906 N.W.2d 186, 201–02 (Iowa 2018) (discussing advancing the public interest through nonmonetary forms of relief that go beyond individual litigants and achieve greater nondiscrimination for others.)

Neither the APA, the EAJA, nor *Hollinrake* prohibits, or conflicts with, ICRA's remedies for violating antidiscrimination laws. Consistent with established principles of statutory construction, the APA, the EAJA, and *Hollinrake* should be read harmoniously with ICRA's statutory right to reasonable attorneys' fees for parties, like Petitioners, who prevail on their ICRA claims. *See* Iowa Code § 4.7 (2022); *Christenson v. Iowa Dist. Court for Polk Cnty.*, 557 N.W.2d 259, 263 (Iowa 1996); *Citizens' Aide/Ombudsman v. Miller*, 543 N.W.2d 899, 903 (Iowa 1996). The district court should have allowed Petitioners to recover their attorneys' fees and costs under both ICRA and EAJA.

B. EAJA's exceptions to fee-shifting do not apply to this case.

The exclusions on which DHS relied before the district court to seek an exemption from EAJA's fee-shifting provision do not apply here. *First*, DHS's role in this case was not "primarily adjudicative." Iowa Code § 625.29(1)(b) (2022). DHS did not have jurisdiction to adjudicate the merits of Petitioners' statutory and

constitutional claims. *Second*, Medicaid is not a "monetary benefit or its equivalent" within the meaning of EAJA. Iowa Code § 625.29(1)(d) (2022). It is a nonmonetary, nonfungible, nondiscretionary benefit available for the sole purpose of acquiring medical treatment. *Third*, DHS's role in this case was not to determine Petitioners' "eligibility" for, or "entitlement" to, Medicaid. Iowa Code § 625.29(1)(d) (2022). Petitioners' eligibility for, and entitlement to, the Iowa Medicaid program were never at issue.

1. DHS's role in this case was not "primarily adjudicative."

DHS's role in this case was not "primarily adjudicative." Iowa Code § 625.29(1)(b) (2022). As the administrative record reflects, DHS merely fulfilled its statutory obligation to provide a process for Petitioners to appeal the denial of their benefits, preserving their claims for judicial review without actually adjudicating any of them. Furthermore, whereas DHS argued in *Good* that Medicaid was not a public accommodation under ICRA—a position this Court ultimately rejected, *Good*, 924 N.W.2d at 861—DHS made no similar legal or factual arguments below in this case.

Instead, the ALJ's proposed decisions, adopted by DHS's director as DHS's final decisions, recognized that DHS had no jurisdiction to adjudicate Petitioners' claims. For example, the ALJ in Mr. Vasquez's proceeding concluded as follows:

> Administrative proceedings can only preserve claims that must be resolved by the judicial branch. [Citation omitted.] This includes

> deciding whether the [DHS's] MCO properly denied [Mr. Vasquez's] request for payment of physician services and payment for gender-affirming surgery. These issues are preserved for judicial review. With no basis to address the constitutional challenges, the MCO decision must be affirmed.

(App. II 770; App. II 932 ("[T]he PROPOSED DECISION you received on March 2, 2021 is ADOPTED as the FINAL DECISION."); *see also* App. II 593–94; App. II 736.) As DHS must concede, there were no disputed facts to adjudicate, and the agency did not, and legally could not, adjudicate Petitioners' legal arguments. Its role was not "primarily"—or, for that matter, *in any way*—adjudicative. Iowa Code § 625.29(1)(b) (2022). That exception to fee-shifting under EAJA does not apply.

The *Endress* and *Pfaltzgraff* cases cited by DHS, are distinguishable, as is the *Branstad* case upon which both *Endress* and *Pfaltzgraff* relied. *Endress* dealt not only with preserving constitutional issues, but also with factual questions requiring agency adjudication regarding the correct computation of overpayments for child-care services. *Endress v. Iowa Dep't of Human Servs.*, 944 N.W.2d 71, 76, 83 (Iowa 2020). *Endress* did not purport to establish new law, but rather applied the analysis announced in *Branstad*. *Id.* (citing *Branstad v. State ex rel. Nat. Res. Comm'n*, 871 N.W.2d 291, 297 (Iowa 2015)).

In *Branstad*, the Court held that the agency's role was "primarily adjudicative" in determining whether a restitution assessment was proper for an environmental violation. *Branstad*, 871 N.W.2d at 296. There, the agency applied

unchallenged rules to decide contested facts to determine whether or not the challenged conduct occurred and the degree or amount of damages caused by the conduct. *Id*. at 293–94. Facts were in dispute; no challenges to the legality or constitutionality of the underlying rules were levied. *Id*.

Pfaltzgraff likewise does not require finding that the "primarily adjudicative" exception in EAJA applies to Petitioners' case. *Pfaltzgraff* was the companion case to *Endress*. The Court in *Pfatlzgraff* did not independently analyze the exception at issue. *Pfaltzgraff v. Iowa Dep't of Human Servs.*, 944 N.W.2d 112, 116 (Iowa 2020). There, as in *Endress*, the agency adjudicated facts regarding the computation of overpayments and a legal claim regarding unjust enrichment. *Id.*

Neither *Endress*, *Pfalzgraff*, nor *Branstad* were cases like this one, where no facts were in dispute and the agency literally did not adjudicate anything because it lacked jurisdiction to decide the claims preserved for judicial review. The administrative record shows that DHS did not adjudicate any factual dispute because no facts were in dispute. (App. II 768–69; App. II 1519–21.) DHS neither presented any of its own evidence, nor sought to contest any of Petitioners' evidence, regarding the medical necessity of the treatment for which Petitioners seek coverage. (*Id*.) The record further shows that the agency could not, and therefore did not, adjudicate a legal dispute, either. (*Id*.) Thus, DHS's role below in this case was not primarily adjudicative and, in fact, was not adjudicative at all.

If DHS's broad interpretation of this exception were correct, then the APA's exhaustion requirement would mean that administrative agencies are *always* immune from fee-shifting for applying rules that violate the Iowa Constitution or ICRA. *See Remer v. Bd. of Med. Exam'rs*, 576 N.W.2d 598, 604 (Iowa 1998) (J. Carter, specially concurring) (noting that "all administrative action that causes adverse consequences to a party seeking attorney's fees under section 625.29 will have gone through a contested case hearing process" and concluding that "this does not mean that the administrative action that is the subject of the complaint was primarily adjudicative").

That result undermines the plain text and legislative purpose of EAJA, which provides a remedy to Iowans whose rights are violated by state administrative agencies, except in limited circumstances. *See* Iowa Code § 625.29(1) (2022); Olson, 71 Chi.–Kent L. Rev. at 555, 561 (Equal Access to Justice Acts are intended to equalize the resources of private parties and the government by shifting fees to the government when a private party prevails in an administrative matter). EAJA expressly allows for fee-shifting in judicial-review actions of contested cases. Iowa Code § 625.29 (2022) (providing for fee-shifting in chapter 17A judicial-review actions, "other than for a rulemaking decision"). Construing the "primarily adjudicative" exception to encompass all contested cases, even when the agency literally did not and could not adjudicate anything, would swallow the rule whole

and violate this express provision for fee-shifting in contested cases where the agency's role was *not* primarily adjudicative.

EAJA's legislative history also supports reading Iowa's limitations on attorney's fees for prevailing parties narrowly against the state, not broadly in its favor, and allowing fee-shifting following contested cases. S.F. 470, 70th Gen. Assemb., 2d Sess. (Iowa 1983), https://www.legis.iowa.gov/docs/shelves/billbooks/70GA/SF%200470.pdf, at 5 (fees should be awarded to prevailing party in judicial-review action "other than for a rule-making decision under the Act"); Fiscal Note to S.F. 470, 70th Gen. Assemb., 2d Sess. (Iowa 1983), https://www.legis.iowa.gov/docs/shelves/billbooks/70GA/SF%200470.pdf, at 4–5 (containing no exclusion for non-rulemaking contested cases and anticipating a substantial annual cost to the state for overreaching administrative agencies).

DHS did not adjudicate Petitioners' legal claims, based on its own determination that it lacked jurisdiction to do so. Nor did it adjudicate any factual dispute. Allowing DHS to shield itself from fee liability based on the exhaustion requirement for contested cases would undermine the plain language and purpose of EAJA's fee-shifting provision. EAJA section 625.29(1)(b)'s exception for cases where an agency's role is "primarily adjudicative" does not apply here.

2. Medicaid is not a "monetary benefit or its equivalent."

In addition, Medicaid is not a "monetary benefit or its equivalent" within the meaning of EAJA. Iowa Code § 625.29(1)(d) (2022). It is a nonmonetary, nonfungible, nondiscretionary benefit available for the sole purpose of acquiring medical treatment. As a result, the exception to fee-shifting for monetary benefits does not apply to this case.

Federal law defines Medicaid as "medical assistance provided under a state plan approved under Title XIX." 42 C.F.R. § 400.200 (2022). Medicaid benefits are distinctly nonmonetary. They are both nonfungible, and nondiscretionary, given that they may only be used to procure medically necessary care. *See* Iowa Dep't of Human Servs., Iowa Health & Wellness Plan, "Benefits," https://dhs.iowa.gov/IHAWP/benefits ("Benefits: doctor visits, women's health, prescription drugs, dental care, preventative health services (vaccinations, blood pressure, and cancer screenings), hospitalizations, emergency services, mental health and substance use services.").

Medical benefits under Medicaid are *not* provided in the form of cash assistance to be spent however the beneficiary may desire. Unlike unemployment benefits, social-security income, or other cash-assistance programs, the state limits which medical providers are available to Medicaid beneficiaries. *See* Iowa Admin. Code r. 441–77 (2022) (setting out "conditions of participation for providers of

medical and remedial care"); Iowa Admin. Code r. 441–79 (2022) (setting out "principles governing reimbursement of providers of medical and health services"); Iowa Dep't of Human Servs., "Provider Enrollment," http://dhs.iowa.gov/ime/providers/ enrollment ("Once a provider is enrolled with the [Iowa Medical Enterprise], they must go through the Managed Care Organization (MCO) credential process.").

In addition, medical benefits, unlike cash-assistance programs, are determined not by their financial value or monetary amount, but rather by a recipient's medical need. *See* Iowa Admin. Code r. 441–78.1 (2022) ("[P]ayment will be approved for all medically necessary services and supplies provided by the physician including services rendered in the physician's office or clinic, the home, in a hospital, nursing home or elsewhere."); Iowa Dep't of Human Servs., "FAQs," https://dhs.iowa.gov/ime/members/member-resources/frequently-asked-questions ("All services are based on medical necessity.").

A *nonmonetary* benefit, such as Medicaid coverage, cannot be the "equivalent" of a *monetary* benefit. A "monetary benefit or its equivalent" is one in which the benefit is monetary in nature—in other words, cash or income assistance like social-security benefits and unemployment-insurance payments. The distinguishing nature of money, defined by its *fungibility*, is essential in giving meaning to the term "monetary benefit or its equivalent" as used in EAJA

Another distinction between monetary and nonmonetary benefits is the *discretionary* nature of monetary benefits, which can be used to purchase or acquire anything of like value, versus the nondiscretionary nature of medical benefits, which cannot be used to acquire anything other than the prescribed treatment. *Cf. Kent v. Employment Appeal Board*, 498 N.W.2d 687, 688 (Iowa 1993) (addressing propriety of fees in a case involving unemployment benefits, which are intended to supplant lost income and are monetary in nature).

The distinction between monetary and nonmonetary benefits cannot simply be written out of the statute. While cash benefits are monetary in nature, medical benefits are not, because, as set forth above, they are not fungible, discretionary, or transferable.

As a result of prevailing in this action, Petitioners will have access to medical care that DHS discriminatorily and unconstitutionally denied to them based on their gender identity. This result is *not* equivalent to monetary damages or a monetary benefit. Iowa Code § 625.29(1)(d) (2022). Therefore, section 625.29(1)(d)'s fee-shifting exception does not apply.

3. DHS's role in this case was not to determine Petitioners' eligibility for, or entitlement to, Medicaid

Finally, the exception to fee-shifting does not apply because DHS's role in this case was not to determine Petitioners' "eligibility" for, or "entitlement" to, Medicaid. Iowa Code § 625.29(1)(d) (2022).

Petitioners' "eligibility" for, or "entitlement" to, the Iowa Medicaid program is simply not at issue in this case. The administrative record shows that DHS has never contested Petitioners' Medicaid eligibility. (App. II 767; App. II 1518.) Eligibility for Medicaid in Iowa, as in all other states, involves meeting certain statutory criteria. In Iowa, Medicaid eligibility requires proof of Iowa residency, proof of identity, and proof of either annual income below a given limit, a disability with a condition recognized by social security, or membership in a specific group (for example, pregnant women with low incomes). Iowa Admin. Code r. 441–75.1 (2022) ("Persons covered"); Iowa Admin. Code r. 441–75.25 (2022) ("'Member' shall mean a person who has been determined eligible for medical assistance under rule 441.75.1."); Iowa Admin. Code r. 441–75.71 (2022) ("Income limits"); *see also* Iowa Dep't of Human Servs., Iowa Health & Wellness Plan, "Who Qualifies," https://dhs.iowa.gov/ihawp/who-qualifies ("To be eligible for the Iowa Health and Wellness Plan, you must: Be an adult age 19 to 64; Have an income that does not exceed 133 [percent] of the Federal Poverty Level . . . Live in Iowa and be a U.S. Citizen; Not be otherwise eligible for Medicaid or Medicare.") A "beneficiary" is "a person who is entitled to Medicare benefits and/or has been determined to be eligible for Medicaid." 42 C.F.R. § 400.200 (2022).

Had Petitioners been denied coverage for the Medicaid program based on their entitlement to, or eligibility for, Medicaid benefits—for example, based on

citizenship or income—the denial would fall within the scope of the exception set forth in EAJA (assuming that the benefits sought were monetary, which they are not). However, in this case, their entitlement to the Medicaid program was not contested. For this additional reason, section 625.29(1)(d)'s fee-shifting exception does not apply, and Petitioners are eligible for fee-shifting under EAJA.

CONCLUSION

For these reasons, Petitioners respectfully request that this Court (1) affirm the district court's ruling that the district court had the authority to adjudicate Petitioners' challenges to the constitutionality of Division XX, (2) affirm the district court's ruling that Division XX violates the Iowa Constitution's equal-protection guarantee, and (3) affirm the district court's ruling that the Regulation violates the Iowa Constitution's equal-protection guarantee.

In addition, on cross-appeal, Petitioners respectfully request that this Court (1) reverse the district court's ruling that Petitioners' ICRA claims were barred because Petitioners did not assert them before the Commission, (2) reverse the district court's ruling dismissing Petitioners' claims for gender-identity discrimination under ICRA, and (3) reverse the district court's denial of Petitioners' requests for attorney's fees and remand this matter to the district court with instructions for the district court to allow Petitioners to submit a fee petition.

REQUEST FOR ORAL ARGUMENT

Petitioners respectfully request oral argument in this matter.

Dated: July 25, 2022

Respectfully submitted,

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